CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, Notices, and Abstracts

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 32 AUGUST 19, 1998 NO. 33

This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

The decisions, rulings, regulations, notices and abstracts which are published in the CUSTOMS BULLETIN are subject to correction for typographical or other printing errors. Users may notify the U.S. Customs Service, Office of Finance, Logistics Division, National Support Services Center, Washington, DC 20229, of any such errors in order that corrections may be made before the bound volumes are published.

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U.S. Customs Service

Treasury Decisions

(T.D. 98–66)

FOREIGN CURRENCIES

DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST FOR JULY 1998

The Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Holiday(s): July 4, 1998.

China (Taiwan) N.T. dollar:

July 1, 1998	$0.029087
July 2, 1998	.029087
July 3, 1998	.029061
July 4, 1998	.029061
July 5, 1998	.029061
July 6, 1998	.028977
July 7, 1998	.029087
July 8, 1998	.029070
July 9, 1998	.029070
July 10, 1998	.029061
July 11, 1998	.029061
July 12, 1998	.029061
July 13, 1998	.028986
July 14, 1998	.029070
July 15, 1998	.029070
July 16, 1998	.029095
July 17, 1998	.029172
July 18, 1998	.029172
July 19, 1998	.029172
July 20, 1998	.029138
July 21, 1998	.029138
July 22, 1998	.029095
July 23, 1998	.029070
July 24, 1998	.029070
July 25, 1998	.029070
July 26, 1998	.029070
July 27, 1998	.029044
July 28, 1998	.029087
July 29, 1998	.029121
July 30, 1998	.029121
July 31, 1998	.029078

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for July 1998 (continued):

Greece drachma:

July 1, 1998	$0.003268
July 2, 1998	.003263
July 3, 1998	.003282
July 4, 1998	.003282
July 5, 1998	.003282
July 6, 1998	.003299
July 7, 1998	.003298
July 8, 1998	.003293
July 9, 1998	.003273
July 10, 1998	.003306
July 11, 1998	.003306
July 12, 1998	.003306
July 13, 1998	.003348
July 14, 1998	.003350
July 15, 1998	.003334
July 16, 1998	.003357
July 17, 1998	.003377
July 18, 1998	.003377
July 19, 1998	.003377
July 20, 1998	.003390
July 21, 1998	.003367
July 22, 1998	.003369
July 23, 1998	.003365
July 24, 1998	.003384
July 25, 1998	.003384
July 26, 1998	.003384
July 27, 1998	.003374
July 28, 1998	.003394
July 29, 1998	.003391
July 30, 1998	.003384
July 31, 1998	.003379

South Korea won:

July 1, 1998	$0.000728
July 2, 1998	.000730
July 3, 1998	.000736
July 4, 1998	.000736
July 5, 1998	.000736
July 6, 1998	.000742
July 7, 1998	.000742
July 8, 1998	.000750
July 9, 1998	.000763
July 10, 1998	.000760
July 11, 1998	.000760
July 12, 1998	.000760
July 13, 1998	.000761
July 14, 1998	.000775
July 15, 1998	.000778
July 16, 1998	.000778
July 17, 1998	.000778
July 18, 1998	.000778
July 19, 1998	.000778
July 20, 1998	.000775
July 21, 1998	.000773
July 22, 1998	.000774
July 23, 1998	.000783

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for July 1998 (continued):

South Korea won (continued):

July 24, 1998	$0.000802
July 25, 1998	.000802
July 26, 1998	.000802
July 27, 1998	.000825
July 28, 1998	.000794
July 29, 1998	.000803
July 30, 1998	.000809
July 31, 1998	.000812

Dated: August 3, 1998.

RICHARD B. LAMAN,
Chief,
Customs Information Exchange.

(T.D. 98–67)

FOREIGN CURRENCIES

VARIANCES FROM QUARTERLY RATES FOR JULY 1998

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, and reflect variances of 5 per centum or more from the quarterly rates published in Treasury Decision 98–61 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Holiday(s): July 4, 1998.

South Africa, Republic of, rand:

July 2, 1998	$0.158103
July 3, 1998	.158103
July 4, 1998	.158103
July 5, 1998	.158103
July 6, 1998	.154560
July 10, 1998	.156617
July 11, 1998	.156617
July 12, 1998	.156617
July 17, 1998	.156495
July 18, 1998	.156495
July 19, 1998	.156495
July 21, 1998	.157233

Dated: August 3, 1998.

RICHARD B. LAMAN,
Chief,
Customs Information Exchange.

U.S. Customs Service

General Notices

PROPOSED COLLECTION; COMMENT REQUEST

AUTOMATED COMMERCIAL SYSTEM SURETY DATA ELEMENT ENHANCEMENTS

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, Customs invites the general public and other Federal agencies to comment on an information collection requirement concerning the enhancement of Surety Data Elements collected by the Customs Automated Commercial System (ACS) by the addition of two new data elements. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)).

DATES: Written comments should be received on or before October 2, 1998, to be assured of consideration.

ADDRESS: Direct all written comments to U.S. Customs Service, Information Services Group, Attn.: J. Edgar Nichols, 1300 Pennsylvania Avenue, NW, Room 3.2C Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to U.S. Customs Service, Attn.: J. Edgar Nichols, Room 3.2C, 1300 Pennsylvania Avenue NW, Washington, D.C. 20229, Tel. (202) 927–1426; or to Mr. Byron Kissane, Room 5.2C, 1300 Pennsylvania Avenue NW, Washington, D.C. 20229, Tel. (202) 927–0380.

SUPPLEMENTARY INFORMATION:

At the request of the American Surety Trade Association, the Customs Service proposes to add two additional data elements to the Automated Broker Interface (ABI) module of ACS. These new data elements are bond amount and producer account number. The new data elements, which are each ten characters in length, shall be captured in the ABI environment only and will not be entered on-line by Customs field personnel for non-ABI entry summary transactions. Additionally, these new data elements will be added to the Automated Surety Interface download. This will facilitate the surety accounting procedures.

Customs invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)). The comments should address: (1) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimates of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology; and (e) estimates of capital or start-up costs and costs of operations, maintenance, and purchase of services to provide information. The comments that are submitted will be summarized and included in the Customs request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document Customs is soliciting comments concerning the following information collection:

Title: Entry and Entry Summary (Electronic Record)

OMB Number: 1515–0065

Form Number: Customs Form 7501 and Electronic Record A–40

Abstract: Customs Form 7501 and Electronic Record A–40 are used by Customs as a record of the impact transaction, to collect proper duty, taxes, exactions, certifications and enforcement endorsements, and to provide copies to Census for statistical purposes.

Current Actions: This change will add two data elements to the electronic record only. There are no other changes to the information collection.

Type of Review: Extension (with change)

Affected Public: Businesses, Individuals, Institutions

Estimated Number of Respondents: 600,000

Estimated Time Per Respondent: 5 minutes

Estimated Total Annual Burden Hours: 50,000

Estimated Total Annualized Cost on the Public: N/A

Dated: July 24, 1998.

J. EDGAR NICHOLS,
Team Leader,
Information Services Group.

[Published in the Federal Register, August 3, 1998 (63 FR 41322)]

COPYRIGHT, TRADEMARK, AND TRADE NAME RECORDATIONS

(No. 5–1998)

AGENCY: U.S. Customs Service, Department of the Treasury.

SUMMARY: The copyrights, trademarks, and trade names recorded with the U.S. Customs Service during the month of June 1998 follow. The last notice was published in the CUSTOMS BULLETIN on May 6, 1998.

Corrections or information to update files may be sent to U.S. Customs Service, IPR Branch, 1300 Pennsylvania Avenue, NW, 3rd floor, Washington, DC 20229.

FOR FURTHER INFORMATION CONTACT: John F. Atwood, Chief, Intellectual Property Rights Branch, (202) 927–2330.

Dated: July 29, 1998.

JOHN F. ATWOOD,
Chief,
Intellectual Property Rights Branch.

The list of recordations follow:

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
COP9800063	19980506	20180506	SILHOUETTE OF A WOMAN HOLDING A CHILD CARVED INTO THE	OTC INTERNATIONAL LTD.	N
COP9800064	19980507	20180507	MULAN	DISNEY ENTERPRISES	N
COP9800065	19980508	20180508	HILARIOUS	SECRIST TOYS, INC.	N
COP9800066	19980508	20180508	MYLO	SECRIST TOYS, INC.	N
COP9800067	19980508	20180508	SUNFLOWER BABIES	MASTER TOYS & NOVELTIES INC.	N
COP9800068	19980508	20180508	CIGAR	KEVIN HARRINGTON ENTERPRISES INC	N
COP9800069	19980511	20180511	HOWL-O-WEEN: A WOLF LIKE CHARACTOR W/MOVING MOUTH	BBS STUDIO INC.	N
COP9800070	19980511	20180511	ROYAL SKULL-A HUMAN SKULL W/POINTED TEETH, HORN	BBS STUDIO INC.	N
COP9800071	19980513	20180513	TY INC. SMOOCHY #4039	TY INC.	N
COP9800072	19980513	20180513	TY INC. ERIN #4186	TY INC.	N
COP9800073	19980513	20180513	TY INC. SPUNKY #4184	TY INC.	N
COP9800074	19980513	20180513	TY INC. POUNCE #4122	TY INC.	N
COP9800075	19980513	20180513	TY INC. MISSY #4185	TY INC.	N
COP9800076	19980513	20180513	TY INC. PRANCE #4123	TY INC.	N
COP9800077	19980513	20180513	TY INC. STRETCH #4182	TY INC.	N
COP9800078	19980513	20180513	TY INC. PUFFER #4181	TY INC.	N
COP9800079	19980513	20180513	TY INC. PRINCESS #4300	TY INC.	N
COP9800080	19980513	20180513	TY INC. BRITTANNIA #4601	TY INC.	N
COP9800081	19980513	20180513	TY INC. IGGY #4038	TY INC.	N
COP9800082	19980513	20180513	TY INC. RAINBOW #4037	TY INC.	N
COP9800083	19980520	20080520	RIVEN, THE SEQUEL TO MYST	CYAN INC.	N
COP9800084	19980520	20080520	STARCRAFT	BLIZZARD ENTERTAINMENT	N
COP9800085	19980520	20180520	YOSHI'S STORY (N64 VERSION)	NINTENDO OF AMERICA INC.	N
SUBTOTAL RECORDATION TYPE		23			
TMK9800331	19980501	20070826	YEAR 2000	PLANET MARKETING INC.	N
TMK9800332	19980501	20071202	YEAR 2000	PLANET MARKETING INC.	N
TMK9800333	19980501	20071223	YEAR 2000	PLANET MARKETING INC.	N
TMK9800334	19980501	20071007	YEAR 2000	PLANET MARKETING INC.	N
TMK9800335	19980504	20070325	COLORFINE	LEXMARK INTERNATIONAL, INC.	N
TMK9800336	19980504	20071007	FONTVISION	LEXMARK INTERNATIONAL, INC.	N
TMK9800337	19980504	20061231	LEXEXPRESS (SERVICE MARK)	LEXMARK INTERNATIONAL, INC.	N
TMK9800338	19980504	20070121	LEXMARK STYLIZED	LEXMARK INTERNATIONAL, INC.	N
TMK9800339	19980504	20070311	LEXMARK	LEXMARK INTERNATIONAL	N
TMK9800340	19980504	20060213	LEXMARK	LEXMARK INTERNATIONAL, INC.	N
TMK9800341	19980505	20061231	LEXONSITE (SERVICE MARK)	LEXMARK INTERNATIONAL, INC.	N
TMK9800342	19980505	20060723	MARKNET	LEXMARK INTERNATIONAL, INC.	N
TMK9800343	19980505	20051212	MARKVISION	LEXMARK INTERNATIONAL, INC.	N
TMK9800344	19980505	20060827	MEDLEY	LEXMARK INTERNATIONAL, INC.	N
TMK9800345	19980505	20060903	OPTRA	LEXMARK INTERNATIONAL, INC.	N
TMK9800346	19980505	20060109	PICTUREGRADE	LEXMARK INTERNATIONAL, INC.	N
TMK9800347	19980505	20071223	PREBATE (SERVICE MARK)	LEXMARK INTERNATIONAL, INC.	N
TMK9800348	19980505	20051226	VALUEWRITER	LEXMARK INTERNATIONAL, INC.	N
TMK9800349	19980506	20080131	TRUMP	BROWN & BIGELOW, INC.	N
TMK9800350	19980506	20060819	SPEEDFEED	SPEEDFEED, INC.	N
TMK9800351	19980506	20070617	POWERADE	COCA-COLA COMPANY, THE	N
TMK9800352	19980506	20051205	B.C.B.G.	AZ3, INC.	N
TMK9800353	19980506	20070930	PACO PACO RABANNE	PACO RABANNE PARFUMS	N

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
TMK9800354	19980506	20000728	MAN WITH GOLF CLUB (DESIGN)	KARSTEN MANUFACTURING CORPORATIO	N
TMK9800355	19980506	20031116	SIMPLE	SIMPLE SHOES, INC.	N
TMK9800356	19980506	20060608	PACO	PACO RABANNE PARFUM	N
TMK9800357	19980506	20050826	DG DAVIS & GECK (STYLIZED)	AMERICAN CYANAMID COMPANY	N
TMK9800358	19980506	20071118	PACO PACO RABANNE SPRAY BOTTLE DESIGN	PACO RABANNE PARFUMS	N
TMK9800359	19980506	20000814	LE PET CAFE	TIMOTHY O'DONNELL	N
TMK9800360	19980506	20070218	MLS & DESIGN	MAJOR LEAGUE SOCCER L.L.C.	Y
TMK9800361	19980506	20070429	MLS	MAJOR LEAGUE SOCCER, INC.	Y
TMK9800362	19980506	20070729	METRO STARS	MAJOR LEAGUE SOCCER L.L.C.	Y
TMK9800363	19980506	20071118	CLASH SAN JOSE & DESIGN	MAJOR LEAGUE SOCCER, L.L.C.	Y
TMK9800364	19980507	20070826	COLUMBUS CREW	MAJOR LEAGUE SOCCER, L.L.C.	Y
TMK9800365	19980507	20070617	MISCELLANEOUS DESIGN	MAJOR LEAGUE SOCCER, L.L.C.	Y
TMK9800366	19980507	20070610	MISCELLANEOUS DESIGN	MAJOR LEAGUE SOCCER, L.L.C.	Y
TMK9800367	19980507	20071007	LOS ANGELES GALAXY	MAJOR LEAGUE SOCCER, L.L.C.	Y
TMK9800368	19980507	20071014	NEW ENGLAND REVOLUTION	MAJOR LEAGUE SOCCER L.L.C.	Y
TMK9800369	19980507	20000904	MONKEY HOLDING PEACH BRAND	PENG TIAO, DBA PENG TRADING CO.	N
TMK9800370	19980507	20050530	EX OFFICIO	EX OFFICIO, INC.	Y
TMK9800371	19980508	19990522	OSCAR	ACADEMY OF MOTION PICTURE ARTS	N
TMK9800372	19980508	20030309	WHITE RABBIT AND DESIGN	SHANGHAI GUAN SHENG YUAN FOOD	N
TMK9800373	19980508	20080308	LIFE SAVERS FIVE LABEL	NABISCO BRANDS INC.	N
TMK9800374	19980509	20010917	TETRIS	ZAO ELORG	N
TMK9800375	19980509	20030216	TETRIS	ZAO ELORG	N
TMK9800376	19980512	20060827	OSCAR	ACADEMY OF MOTION PICTURE ARTS	N
TMK9800377	19980512	20060305	STATUETTE DESIGN	ACADEMY OF MOTION PICTURE ARTS	N
TMK9800378	19980512	20050530	STATUETTE DESIGN	ACADEMY OF MOTION PICTURE ARTS	N
TMK9800379	19980512	20061210	OSCAR	ACADEMY OF MOTION PICTURE ARTS	N
TMK9800380	19980512	20050228	ACADEMY AWARDS	ACADEMY OF MOTION PICTURE ARTS	N
TMK9800381	19980512	20060213	ACADEMY AWARDS	ACADEMY OF MOTION PICTURE ARTS	N
TMK9800382	19980513	20001106	MUSIC OF THE WORLD	MUSIC OF THE WORLD PRODUCTIONS,	N
TMK9800383	19980513	20071217	GRAY STRAND	AMSTED INDUSTRIES INCORPORATED	N
TMK9800384	19980513	20071129	STEARNS MARK OF EXCELLENCE AND DESIGN	STEARNS, INC.	Y
TMK9800385	19980514	20080310	BLACK DIAMOND	SUN WORLD INTERNATIONAL INC.	N
TMK9800386	19980514	20080317	SKECHERS	SKECHERS U.S.A. INC.	N
TMK9800387	19980514	20070527	SPORT-UTILITY SKECHERS USA BAGS AND DESIGN	SKECHERS U.S.A. INC.	N
TMK9800388	19980515	20030612	ALBERTO	ALBERTO-CULVER COMPANY	N
TMK9800389	19980515	20050128	VO5 STYLIZED	ALBERTO-CULVER COMPANY	N
TMK9800390	19980515	20090107	FDS	ALBERTO-CULVER COMPANY	N
TMK9800391	19980515	20030921	MOTIONS	ALBERTO-CULVER COMPANY	N
TMK9800392	19980515	20040827	TRESEMME	ALBERTO-CULVER COMPANY	N
TMK9800393	19980515	20060318	ST. IVES	ST. IVES LABORATORIES, INC.	N
TMK9800394	19980515	20030628	ST. IVES AND DESIGN	ST. IVES LABORATORIES, INC.	N
TMK9800395	19980515	20060520	SWISS FORMULA	ST. IVES LABORATORIES, INC.	N
TMK9800396	19980515	20031116	26 RED	SPOT INTERNATIONAL INC.	N
TMK9800397	19980515	20051003	FIVE CROWN	SPOT INTERNATIONAL INC.	N
TMK9800398	19980515	20060409	BALATA B	ANTHONY MARINO	N
TMK9800399	19980515	20060416	BALATA	ANTHONY MARINO	N
TMK9800400	19980521	20080310	MASECA AND DESIGN	MOLINOS AZTECA S.A.	N
TMK9800401	19980521	20070715	ADAMS AND DESIGN	ADAMS GOLF, INC.	Y
TMK9800402	19980521	20080324	THE UPSIDE DOWN WOODS	ADAMS GOLF, INC.	Y

07/28/98
15:56:04

U.S. CUSTOMS SERVICE
IPR RECORDATIONS ADDED IN MAY 1998

PAGE 3
DETAIL

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
TMK9800403	19980521	20090502	ROUNDTREE & YORKE	DILLARD'S INC.	Y
TMK9800404	19980521	20001002	PRESTON & YORK	DILLARD'S INC.	Y
TMK9800405	19980521	20070610	DESIGN OF A CHAIR	VIRCO MFG. CORPORATION	N
TMK9800406	19980521	20080620	RAY-BAN (SCRIPT) DESIGN	BAUSCH & LAMB INCORPORATED	N
TMK9800407	19980522	20070407	GUESS? V	GUESS? INC.	N
TMK9800408	19980522	20040527	GUESS? V	GUESS? INC.	N
TMK9800409	19980522	20020728	GUESS	GUESS? INC.	N
TMK9800410	19980522	20070708	GUESS	GUESS? INC.	N

SUBTOTAL RECORDATION TYPE 80

TOTAL RECORDATIONS ADDED THIS MONTH 103

COPYRIGHT, TRADEMARK, AND TRADE NAME RECORDATIONS

(No. 6–1998)

AGENCY: U.S. Customs Service, Department of the Treasury.

SUMMARY: The copyrights, trademarks, and trade names recorded with the U.S. Customs Service during the month of June 1998 follow. The last notice was published in the CUSTOMS BULLETIN on May 6, 1998.

Corrections or information to update files may be sent to U.S. Customs Service, IPR Branch, 1300 Pennsylvania Avenue, NW, 3rd floor, Washington, DC 20229.

FOR FURTHER INFORMATION CONTACT: John F. Atwood, Chief, Intellectual Property Rights Branch, (202) 927–2330.

Dated: July 29, 1998.

JOHN F. ATWOOD,
Chief,
Intellectual Property Rights Branch.

The list of recordations follow:

07/22/98 U.S. CUSTOMS SERVICE PAGE 1
13:31:14 IPR RECORDATIONS ADDED IN JUNE 1998 DETAIL

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
COP9800086	19980608	20180608	COCONUT	NOVELTY CRYSTAL CORPORATION	N
COP9800087	19980610	20180610	SUPER CHALLENGER - ®CT4502	CREATIVE MERCHANDISE CORP.	N
COP9800088	19980612	20180612	THE KIDS	KENNETH BISHOP	N
COP9800089	19980616	20180616	TALKING CHRISTMAS TREE - DOUGLAS FIR (24 INCH)	GEMMY INDUSTRIES CORPORATION	N
COP9800090	19980618	20180618	PARTY PRINT 'N PLAY CD-ROM	MATTEL INC.	N
COP9800091	19980618	20180618	HOT WHEELS MOTORIZED X-V RACERS	MATTEL INC.	N
COP9800092	19980618	20180618	ADVENTURES WITH BARBIE-OCEAN DISCOVERY CD-ROM	MATTEL INC.	N
COP9800093	19980618	20180618	"WHOOO SAYS" TEACHING OWL TOY	MATTEL INC.	N
COP9800094	19980618	20180618	MAGIC HAIR STYLER CD-ROM	MATTEL INC.	N
COP9800095	19980618	20180618	HOT WHEELS TRACK SYSTEM	MATTEL INC.	N
COP9800096	19980618	20180618	BUBBLING MERMAID BARBIE	MATTEL INC.	N
COP9800097	19980618	20180618	SEE 'N SAY FUNNY RHYMES TUNE MAKER	MATTEL INC.	N
COP9800098	19980618	20180618	SEE 'N SAY SLIDE & SEEK ZOO PALS	MATTEL INC.	N
COP9800099	19980618	20180618	TEEN SKIPPER	MATTEL INC.	N
COP9800100	19980618	20180618	WUBBIES	WUBBIES WORLD INTERNATIONAL INC.	N
COP9800101	19980625	20180625	JAMES BOND 007 (DMG VERSION)	NINTENDO OF AMERICA, INC.	N
SUBTOTAL RECORDATION TYPE			16		
TMK9800411	19980601	20080303	TI BUBBLE 2	TAYLOR MADE GOLF COMPANY INC.	N
TMK9800412	19980601	20071209	DESIGN OF A GOLF CLUB	TAYLOR MADE GOLF COMPANY INC.	N
TMK9800413	19980601	20050827	ZEL'S & DESIGN (SERVICE MARK)	ROUTMAN'S INCORPORATED	N
TMK9800415	19980601	20060813	BREAKWATER	A.R. CLARKE LIMITED	N
TMK9800416	19980601	20020915	W IN TRIANGLE DESIGN	WYANDOTTE INDUSTRIES, INC.	N
TMK9800417	19980602	20071202	ART DECO	MIAMI CIGARS & CO.	N
TMK9800418	19980602	20080224	NET LITES	J KINDERMAN & SONS, INC.	Y
TMK9800419	19980603	20080120	VALUE = FASHION + QUALITY + PRICE	LOUIS HORNICK & CO. INC.	N
TMK9800420	19980603	20030421	CHRISTIAN DIOR	PARFUMS CHRISTIAN DIOR, S.A.	N
TMK9800421	19980604	20030714	MISS DIOR STYLIZED	PARFUMS CHRISTIAN DIOR, S.A.	N
TMK9800422	19980604	20000719	DIORISSIMO	PARFUMS CHRISTIAN DIOR, S.A.	N
TMK9800423	19980604	20000113	EAU SAUVAGE	PARFUMS CHRISTIAN DIOR S.A.	N
TMK9800424	19980604	20010119	DIORESSENCE	PARFUMS CHRISTIAN DIOR S.A.	N
TMK9800425	19980604	20080621	MISCELLANEOUS DESIGN (SCROLL DESIGN)	PARRIS MANUFACTURING COMPANY	N
TMK9800426	19980604	20070801	MASECA AND DESIGN	DESARROLLO INDUSTRIAL Y TECHN	N
TMK9800427	19980604	20040621	OWENS CORNING & DESIGN	OWENS-CORNING FIBERGLAS TECHNOLO	N
TMK9800428	19980604	20040108	DIORELLA	PARFUMS CHRISTIAN DIOR, S.A.	N
TMK9800429	19980604	20060326	OWENS CORNING & DESIGN	OWENS-CORNING FIBERGLAS TECHNOLO	N
TMK9800430	19980604	20070701	OWENS CORNING & DESIGN	OWENS-CORNING FIBERGLAS TECHNOLO	N
TMK9800431	19980604	20041113	POISON	PARFUMS CHRISTIAN DIOR, S.A.	N
TMK9800432	19980604	20060109	OWENS CORNING & DESIGN	OWENS-CORNING FIBERGLAS TECHN	N
TMK9800433	19980604	20080217	OWENS CORNING & DESIGN	OWENS-CORNING FIBERGLAS TECHN	N
TMK9800434	19980604	20070527	OWENS CORNING & DESIGN	OWENS-CORNING FIBERGLAS TECHN	N
TMK9800435	19980604	20041122	OWENS CORNING & DESIGN	OWENS-CORNING FIBERGLAS TECHN	N
TMK9800436	19980604	20040125	OWENS CORNING & DESIGN	OWENS-CORNING FIBERGLAS TECHN	N
TMK9800437	19980604	20080405	FAHRENHEIT	PARFUMS CHRISTIAN DIOR, S.A.	N
TMK9800438	19980604	20051107	OWENS CORNING & DESIGN	OWENS-CORNING FIBERGLAS TECHN	N
TMK9800439	19980604	20041025	OWENS CORNING & DESIGN	OWENS-CORNING FIBERGLAS TECHN	N
TMK9800440	19980604	20040503	OWENS CORNING & DESIGN	OWENS-CORNING FIBERGLAS TECHN	N
TMK9800441	19980604	20050124	OWENS CORNING & DESIGN	OWENS-CORNING FIBERGLAS TECHN	N

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
TMK9800442	19980604	20070128	OWENS CORNING	OWENS-CORNING FIBERGLAS TECHN	N
TMK9800443	19980604	20080426	CHRISTIAN DIOR AND DESIGN	PARFUMS CHRISTIAN DIOR, S.A.	N
TMK9800444	19980604	20031123	CAPTURE	PARFUMS CHRISTIAN DIOR, S.A.	N
TMK9800445	19980604	20080920	ARIZONA AND DESIGN	ARIZONA BOARD OF REGENTS ON	Y
TMK9800446	19980604	20020512	"A" STYLIZED (SERVICE MARK)	ARIZONA BOARD OF REGENTS ON	Y
TMK9800447	19980604	20040327	OWENS/CORNING FIBERGLAS	OWENS-CORNING FIBERGLAS TECHN	N
TMK9800448	19980604	20010707	OWENS/CORNING FIBERGLAS	OWENS-CORNING FIBERGLAS TECHN	N
TMK9800449	19980605	20020825	SIGILLVM VNIVERSITATIS ARIZONENSIS 1885 & DESIGN	ARIZONA BOARD OF REGENTS ON BEHA	Y
TMK9800450	19980605	20021117	ARIZONA (SERVICE MARK)	ARIZONA BOARD OF REGENTS ON BEHA	Y
TMK9800451	19980605	20040208	COSTUMED WILDCAT DESIGN	ARIZONA BOARD OF REGENTS ON BEHA	Y
TMK9800452	19980605	20081011	BEAR DOWN	ARIZONA BOARD OF REGENTS ON BEHA	Y
TMK9800453	19980605	20020929	CATS	ARIZONA BOARD OF REGENTS ON BEHA	Y
TMK9800454	19980605	20081101	WILDCAT HEAD DESIGN	ARIZONA BOARD OF REGENTS ON BEHA	Y
TMK9800455	19980605	20080920	ARIZONA WILDCATS AND DESIGN	ARIZONA BOARD OF REGENTS ON BEHA	Y
TMK9800456	19980605	20070201	COKE RIBBON DESIGN	COCA-COLA COMPANY	N
TMK9800457	19980605	20080127	CUPIDO	BGD GLOBAL, LLC	N
TMK9800458	19980608	20070527	WILSONART	WILSONART INTERNATIONAL INC.	N
TMK9800459	19980608	20020505	WILSONART	WILSONART INTERNATIONAL INC.	N
TMK9800460	19980608	20020728	WILSONART	WILSONART INTERNATIONAL INC.	N
TMK9800461	19980608	20090704	WILSONART	WILSONART INTERNATIONAL INC.	N
TMK9800462	19980608	20091114	WILSONART	WILSONART INTERNATIONAL INC.	N
TMK9800463	19980608	20061125	WILSONART	WILSONART INTERNATIONAL INC.	N
TMK9800464	19980608	20041011	BACTRASTAT	HOME CARE INDUSTRIES INC.	N
TMK9800465	19980609	20010825	JAGUAR	JAGUAR CARS LIMITED	N
TMK9800466	19980609	20080301	MISCELLANEOUS DESIGN	EMERSON ELECTRIC CO.	N
TMK9800467	19980610	20070909	RELEVE PET PROTECTION SYSTEM	HTZ INVESTMENT CORP.	N
TMK9800468	19980610	20070610	FRANCE 98 WORLD CUP AND DESIGN	ISL PROPERTIES, LTD.	N
TMK9800469	19980610	20061216	BERTONI TROPHY (FIFA WORLD CUP TROPHY IMAGE)	ISL PROPERTIES AG	N
TMK9800470	19980610	20070930	TWINHEAD AND DESIGN	TWINHEAD INTERNATIONAL CORP.	N
TMK9800471	19980610	20021027	EILEEN FISHER NEW YORK/WORD CONFIGURATION DESIGN	EILEEN FISHER, INC.	N
TMK9800472	19980610	20060820	EILEEN FISHER STYLIZED	EILEEN FISHER, INC.	N
TMK9800473	19980610	20060924	EILEEN FISHER/WORD CONFIGURATION DESIGN	EILEEN FISHER, INC.	N
TMK9800474	19980611	20080127	OMNI COMPUTER PRODUCTS	GERALD CHAMALES CORP.	N
TMK9800475	19980611	20080414	RHINOTEK (SERVICE MARK)	GERALD CHAMALES CORP.	N
TMK9800476	19980611	20080210	RHINOTEK	GERALD CHAMALES CORP.	N
TMK9800477	19980611	20070929	WILLIAMS BAY	WILLIAMS BAY TRADING CO., LTD.	Y
TMK9800478	19980611	20040712	EXTERIORS AND DESIGN	WILLIAMS BAY TRADING CO., LTD.	Y
TMK9800479	19980612	20060514	UGG	DECKERS OUTDOOR CORPORATION	N
TMK9800480	19980616	20050613	DUCK GLOVES	WILLIAMS BAY TRADING COMPANY	Y
TMK9800481	19980616	20090418	MILO AND DESIGN	SOCIETE DES PRODUITS NESTLE S.A.	N
TMK9800482	19980616	20070625	MILO STYLIZED LETTERING	SOCIETE DES PRODUITS NESTLE S.A.	N
TMK9800483	19980616	20060409	REBELS	BALLE, EYAL	Y
TMK9800484	19980616	20070916	SEALS UNLIMITED	KO-KO APPAREL INC.	Y
TMK9800485	19980616	20080414	SPARKLING RESULTS	RED DIAMOND INC.	N
TMK9800486	19980617	20080621	PARI BRAND AND DESIGN	KUSHA INC.	N
TMK9800487	19980617	20010917	CROSSROADS	SPECIALIZED BICYCLE COMPONENTS	N
TMK9800488	19980617	20060422	CROSSROADS	SPECIALIZED BICYCLE COMPONENTS	N
TMK9800489	19980617	20041224	STUMPJUMPER	SPECIALIZED BICYCLE COMPONENTS	N
TMK9800490	19980617	20041218	STUMPJUMPER (STYLIZED LETTERING)	SPECIALIZED BICYCLE COMPONENTS	N

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
TMK9800491	19980617	20050305	ROCKHOPPER	SPECIALIZED BICYCLE COMPONENTS	N
TMK9800492	19980617	20030727	GROUND CONTROL	SPECIALIZED BICYCLE COMPONENTS	N
TMK9800493	19980617	20070610	GROUND CONTROL	SPECIALIZED BICYCLE COMPONENTS	N
TMK9800494	19980617	20060909	GROUND CONTROL	SPECIALIZED BICYCLE COMPONENTS	N
TMK9800495	19980617	20080719	HARDROCK (STYLIZED LETTERING)	SPECIALIZED BICYCLE COMPONENTS	N
TMK9800496	19980617	20081206	S (STYLIZED)	SPECIALIZED BICYCLE COMPONENTS	N
TMK9800497	19980617	20031108	S (STYLIZED)	SPECIALIZED BICYCLE COMPONENTS	N
TMK9800498	19980617	20020925	S (STYLIZED) WORKS	SPECIALIZED BICYCLE COMPONENTS	N
TMK9800499	19980617	20060114	SPECIALIZED	SPECIALIZED BICYCLE COMPONENTS	N
TMK9800500	19980617	20090314	SPECIALIZED	SPECIALIZED BICYCLE COMPONENTS	N
TMK9800501	19980618	20080127	DELMANETTE	NINA FOOTWEAR CORPORATION	N
TMK9800502	19980618	20070211	NINA DOLL (STYLIZED LETTERING)	NINA FOOTWEAR CORPORATION	N
TMK9800503	19980618	20010604	ROBOGRIP	APPLIED CONCEPTS, INC.	N
TMK9800504	19980618	20080414	GREAT BIG BERTHA MEDALLION DESIGN	CALLAWAY GOLF COMPANY	N
TMK9800505	19980618	20080414	MEDALLION OUTLINE	CALLAWAY GOLF COMPANY	N
TMK9800506	19980626	20070325	GOLDEN HADDIE	GULF PACIFIC SEAFOOD, INC.	N
TMK9800507	19980626	20060527	PEARL RIVER BRIDGE & DESIGN	GUANGDONG FOODSTUFFS IMPORT & EX	N
TMK9800508	19980626	20031221	ASSAULT	ADAMS GOLF, INC.	Y

SUBTOTAL RECORDATION TYPE 97

TOTAL RECORDATIONS ADDED THIS MONTH 113

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, August 5, 1998.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

STUART P. SEIDEL,
Assistant Commissioner,
Office of Regulations and Rulings.

PROPOSED MODIFICATION OF A RULING LETTER PERTAINING TO THE CLASSIFICATION OF A FABRIC-COVERED CARDBOARD BOX IMPORTED WITH A RING INSIDE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification of a tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1) of the Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling pertaining to the tariff classification of a fabric-covered cardboard box imported with a ring inside.

DATE: Comments must be received on or before September 18, 1998.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1300 Pennsylvania Avenue, NW, Washington, D.C. 20229 (14th Street entrance). Comments submitted may also be inspected at that address.

FOR FURTHER INFORMATION CONTACT: Rebecca A. Hollaway, Commercial Rulings Division (202) 927–2379.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1) of the Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Moderniza-

tion) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify New York Ruling Letter (NY) B88188, dated August 18, 1997, with respect to the classification of a fabric-covered cardboard box imported with a ring inside. In NY B88188, the box was classified along with the jade ring under subheading 7116.20.4000 of the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). That ruling is set forth as "Attachment A" to this document. The classification of the jade ring under subheading 7116.20.4000 was correct. However, it is our view that the fabric-covered box should have been classified under subheading 6307.90.9989, HTSUSA, as an other made up article.

Before taking this action, we will give consideration to any written comments timely received. Proposed HQ 961206 modifying NY B88188 is set forth as "Attachment B" to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: July 29, 1998.

JOHN E. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
New York, NY, August 18, 1997.

CLA–2–71:RR:NC:SP:233 B88188
Category: Classification
Tariff No. 7116.20.4000

MR. MIKE TODD
EMPIRE INTERNATIONAL
2901 W. Pacific Coast Hwy.
Suite 365
Newport Beach, CA 92663

Re: The tariff classification of a jade ring and fabric covered cardboard box imported together from China.

DEAR MR. TODD:

In your letter dated July 24, 1997, you requested a tariff classification ruling.

The submitted sample is a ring carved out of jade. It measures 1 inch in diameter. You indicate that the ring also comes in 1.25, 1.5, 1.75 and 2 inch diameters. The ring will be imported in a box composed of a paperboard base covered with an exterior surface of velvet fabric. The interior has a padded textile lining. The hinged lid has a padded lining and a latch closure. The box is square in design measuring approximately 7.5cm x 7.5cm x 4cm. You indicate that the box also comes in 8.5cm x 8.5cm x 4cm.

The applicable subheading for the jade ring will be 7116.20.4000, Harmonized Tariff Schedule of the United States (HTS), which provides for Articles of * * * semiprecious stones (natural, synthetic or reconstructed): * * * Other: Other. The rate of duty will be 14.7% ad valorem.

The box is properly classified with the jade ring in accordance with General Rule of Interpretation 5.(a) which states: Camera cases, musical instrument cases, gun cases, drawing instrument cases, necklace cases and similar containers, specially shaped or fitted to contain a specific article or set of articles, suitable for long-term use and entered with the articles for which they are intended, shall be classified with such articles when of a kind normally sold therewith. This rule does not, however, apply to containers which give the whole its essential character.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Lawrence Mushinske at 212–466–5739.

GWENN KLEIN KIRSCHNER,
Chief, Special Products Branch,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:TE 961206 RH
Category: Classification
Tariff No. 6307.90.9989

MR. MIKE TODD
EMPIRE INTERNATIONAL
2901 W. Pacific Coast Highway
Suite 365
Newport Beach, CA 92663

Re: Modification of NY B88188; classification of a fabric-covered cardboard box imported with a ring inside; trinket box; jewelry box; heading 4202; heading 6307; GRI 5(a).

DEAR MR. TODD:

A copy of your letter dated July 24, 1997, concerning the classification of a jade ring and a fabric-covered cardboard box was forwarded to our office for review along with New York Ruling Letter (NY) B88188, issued to you on August 18, 1997, by the Director, National Commodity Specialist Division. In NY B88188, the box was classified along with the jade ring under subheading 7116.20.4000 of the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), as articles of precious or semiprecious stones, in accordance with the General Rules of Interpretation (GRI) 5(a).

Prior to the issuance of NY B88188, you state that you imported the box and ring on two occasions. Upon the first importation, the articles were classified under the provisions set forth in the NY ruling. However, Customs detained the goods on the second importation and imposed visa and quota requirements. The specifics of that entry were not provided to us, and we assume for purposes of this ruling that the matter has been resolved.

Facts:

The merchandise under consideration is a box composed of a paperboard base which is covered on the exterior with velvet fabric. The interior has a padded textile lining. The box also has a lid with a padded lining and latch closure. The box is square and comes in two sizes—approximately 7.5 cm x 7.5 cm x 4 cm and 8.5 cm x 8.5 cm x 4 cm. The box is imported with the jade ring inside. We note, however, that only the box was forwarded to our office for review.

Issue:

What is the proper classification of the decorative box?

Law and Analysis:

Classification under the HTSUSA is governed by the GRI's. GRI 1 provides that classification is determined in accordance with the terms of the headings and any relative section or chapter notes. Where goods cannot be classified solely on the basis of GRI 1, the remaining GRI's will be applied in sequential order.

The Explanatory Notes (EN's) to the Harmonized Commodity Description and Coding System assist us in the classification of merchandise. The EN's constitute the official interpretation of the nomenclature at the international level. While not legally binding, they represent the considered views of classification experts of the Harmonized System Committee. It has been the practice of the Customs Service to follow, whenever possible, the terms of the EN's when interpreting the HTSUSA.

In NY B88188, classification of the jade ring, which is not is dispute, was under subheading 7116.20.4000, HTSUSA. The box was classified under the same provision as the ring in accordance with GRI 5(a), which reads:

> Camera cases, musical instrument cases, gun cases, drawing instrument cases, necklace cases and similar containers, specially shaped or fitted to contain a specific article or set of articles, suitable for long-term use and entered with the articles for which they are intended, shall be classified with such articles when of a kind normally sold therewith. This rule does not, however, apply to containers which give the whole its essential character;

The Explanatory Notes to GRI 5(a) state:

> (I) This Rule shall be taken to cover only those containers which:
>
> (1) are specially shaped or fitted to contain a specific article or set of articles, i.e., they are designed specifically to accommodate the article for which they are intended. Some containers are shaped in the form of the article which they contain;
>
> (2) are suitable for long-term use, i.e., they are designed to have a durability comparable to that of the articles for which they are intended. These containers also serve to protect the article when not in use (during transport or storage, for example). These criteria enable them to be distinguished from simple packings;
>
> (3) are presented with the articles for which they are intended, whether or not the articles are packed separately for convenience of transport. Presented separately the containers are classified in their appropriate headings;
>
> (4) are of a kind normally sold with such articles; and
>
> (5) do not give the whole its essential character.

In addition, the EN to GRI 5(a)(III) gives two examples of containers not covered by GRI 5(a)—"a silver caddy containing tea, or an ornamental ceramic bowl containing sweets."

After examining the box you sent us, we find that it, like a silver caddy, is neither specifically shaped nor fitted to hold a particular article. The box may hold various items, i.e., stamps, coins, earrings, pins, etc. Its use is limited only by the imagination of the ultimate consumer and the physical dimensions of the box. Accordingly, it does not qualify for classification with the ring in heading 7116, under the principles of GRI 5(a).

Additionally, since the box will be imported with a jade ring inside, we must consider whether those articles are a set under GRI 3(b). Explanatory Note X to GRI 3(b), which indicates that for purposes of the rule, the term "goods put up in sets for retail sale" means goods which:

> (a) consist of at least two different articles which are *prima facie*, classifiable in different headings;
>
> (b) consist of products or articles put up together to meet a particular need or carry out a specific activity; and
>
> (c) are put up in a manner suitable for sale directly to users without repacking (e.g., in boxes or cases or on boards).

The subject goods only meet criteria (a) and are not classifiable as a set. Therefore, the ring and box will be classified separately. The jade ring was properly classified in NY B88188 under subheading 7116.20.4000. Several headings merit consideration for classification of the box. Under GRI 1, consideration is given to the tariff provision for containers of heading 4202, HTSUSA. This heading covers:

> Trunks, suitcases, vanity cases, attache cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters

and similar containers; travelling bags, toiletry bags, knapsacks and backpacks, handbags, shopping bags, wallets, purses, map cases, cigarette cases, tobacco pouches, tool bags, sports bags, bottle cases, jewelry boxes, powder cases, cutlery cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fiber or of paperboard, or wholly or mainly covered with such materials or with paper.

The EN's to heading 4202 state, in part, that:

> The term "jewellery boxes" covers not only boxes specially designed for keeping jewellery, but also similar lidded containers of various dimensions (with or without hinges or fasteners) specially shaped or fitted to contain one or more pieces of jewellery and normally lined with textile material, of the type in which articles of jewellery are presented and sold and which are suitable for long-term use.

As stated above, the box in question may be used to hold a variety of items and is not specially designed for keeping jewelry. Thus, it is not classifiable as a jewelry box under heading 4202.

In previous rulings, Customs determined that boxes similar to the one at issue were "trinket boxes." Trinket boxes are not specially designed, shaped or fitted for jewelry. They are not specially constructed to fit any particular item, but like the box at issue, can be used to store various items. See, HQ 953393, dated April 16, 1993. In that ruling, Customs classified a small pentagon shaped box with a lid, which was constructed out of cardboard and covered with textile materials, in heading 6307, HTSUSA, a residual provision for other made up textile articles.

Moreover, in HQ 954706, dated February 1, 1994, Customs determined that two boxes used in the sale of jewelry products to retailers were trinket boxes classifiable under heading 6307, HTSUSA. One box was a small heart shape and the other box was in the shape of a pentagon. Both boxes were made of paperboard and covered with textile materials. An item of jewelry, such as a chain, bracelet, pendant, ring, earring, etc., was placed inside the box and sold at retail. Like the box under consideration, there were no inserts in the heart or pentagon shaped boxes—the jewelry merely rested on the cushioned interior. Since the boxes were not specially designed, shaped or fitted for jewelry, they were considered trinket boxes and were classified under heading 6307, as other textile articles, as opposed to jewelry boxes of heading 4202. The box at issue is also sold with jewelry inside, but like the boxes in HQ 954706, the instant box is not specially designed, shaped or fitted for jewelry and is properly described as a trinket box.

Trinket boxes are not specifically provided for in the terms of the HTSUSA, and, like the trinket boxes in HQ 954706 and HQ 953393, the instant box is a composite good. Thus, it cannot be classified in accordance with GRI 1. Accordingly, we must look to the remaining GRI's, in order, to determine classification.

GRI 2 directs that "goods consisting of more than one material or substance shall be classified according to the principles of rule 3." The box under consideration is constructed of cardboard and textile fabric. GRI 3(a), reads:

> The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.

The applicable headings in this case are 4823, HTSUSA, which provides for, among other things, other articles of paper or paperboard and 6307, HTSUSA, covering other made up articles of textile materials. As each heading refers to only part of the box, they are considered to be equally specific, rendering classification on the basis of specificity (GRI 3(a)) inapplicable.

Under GRI 3(b), articles composed of two or more materials are classified according to their essential character. In this case, the paperboard provides the structure for the box, but the textile fabric provides aesthetic appeal and marketability. As in HQ 953393 and HQ 954706, we are unable to conclude that any one of the component materials imparts the essential character. Therefore, we proceed to GRI 3(c).

GRI 3(c), provides that: "When goods cannot be classified by reference to 3(a) or 3(b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration." Under this rule, the boxes at issue are classifiable under heading 6307, HTSUSA.

Holding:

The jade ring was properly classified in NY B88188, HTSUSA. However, that ruling is modified to reflect the correct classification of the paperboard boxes covered with textile fabric under subheading 6307.90.9989, HTSUSA, which provides for other made up articles, including dress patterns: other: other: other: other: other. The applicable rate of duty is 7% ad valorem.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact the local Customs office prior to importing the merchandise to determine the current status of any import restraints or requirements.

JOHN DURANT,
Director,
Commercial Rulings Division.

PROPOSED MODIFICATION OF RULING LETTER RELATING TO TARIFF CLASSIFICATION OF PLASTIC WHEELS CONTAINING ANTIFRICTION BALLS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling relating to the tariff classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of certain plastic components designed for use with overhead conveyors. These are plastic wheels containing steel antifriction balls designed to roll along the track of an overhead chain conveyor in poultry processing plants. Customs invites comments on the correctness of the proposed modification.

DATE: Comments must be received on or before September 18, 1998.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Submitted comments may be inspected at the same location during regular business hours.

FOR FURTHER INFORMATION CONTACT: James A. Seal, Commercial Rulings Division (202) 927–0760.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Moderniza-

tion) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling relating to the tariff classification of plastic wheels containing steel antifriction balls for use with overhead conveyors. Customs invites comments on the correctness of the proposed modification.

NY 867993, dated November 6, 1991, in part classified a plastic wheel containing steel antifriction balls and a plastic wheel with stainless steel inner race, antifriction balls, and threaded shaft, both used with overhead chain conveyors in poultry plants, in subheading 8431.39.00, HTSUS, as other parts of conveyors. This ruling was based on the characterization of these articles as wheels and as parts of conveyors. *NY* 867993 is set forth as "Attachment A" to this document.

It is now Customs position that these articles are classifiable in subheading 8482.10.50, HTSUS, as other ball bearings. *HQ* 962086 modifying *NY* 867993 is set forth as "Attachment B" to this document. Before taking this action, we will give consideration to any written comments timely received.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Date: August 4, 1998.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, November 6, 1991.

CLA–2–84:S:N:N1:103 867993
Category: Classification
Tariff No. 8431.39.0010

MR. ROBERT S. SMITH
MCGUIRE, WOODS BATTLE & BOOTHE
THE AMY AND NAVY CLUB BUILDING
1627 Eye Street, N.W.
Washington, DC 20006

Re: The tariff classification of conveyor parts from England.

DEAR MR. SMITH:

In your letter dated October 16, 1991 on behalf of BNL Limited and its wholly owned U.S. subsidiary, IABC, you requested a tariff classification ruling.

Your inquiry concerns plastic components which are designed for overhead conveyors. You submitted samples of the following items:

1. Wheel (part no. AF8MDWH)—a circular plastic wheel approximately 2 inches in diameter and containing polished steel antifriction balls, designed to roll along the track of an overhead chain conveyor in poultry processing plants.
2. Wheel/pulley (part no. AC8MDP58)—a plastic wheel with flanged edges designed to roll along a pipe, tube or extrusion in an overhead conveyor system for the clothing industry.
3. Plastic yoke (part no. D1029)—two identical plastic yokes are joined together to form a Y-shaped assembly into which the wheels are mounted. The entire unit forms a trolley mechanism which runs on an I-beam of an overhead conveyor for poultry processing plants.
4. Heavy-duty Wheel (part no. D2081 HD)—a plastic wheel with a stainless steel inner race, antifriction balls, and threaded shaft. Again, used in an overhead conveyor in poultry processing plants.

The applicable subheading for the wheels, wheel/pulley, and yoke described above will be 8431.39.0010, Harmonized Tariff Schedule of the United States (HTS), which provides for other parts of elevators and conveyors. The rate of duty will be 2 percent ad valorem.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,
Area Director,
New York Seaport.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA-2 RR:CR:GC 962086 JAS
Category: Classification
Tariff No. 8482.10.50

ROBERT S. SMITH, ESQ.
MCGUIRE, WOODS, BATTLE & BOOTHE
1627 Eye Street, N.W.
Washington, DC 20006

Re: *NY* 867993 Modified; plastic wheel, plastic and steel wheel incorporating steel antifriction balls used in overhead conveyors; parts of conveyors, Heading 8431; articles that hold and guide machinery parts and reduce friction; other ball bearings, Heading 8482; *THK America, Inc. v. United States*; Section XVI, Note 2, HTSUS.

DEAR MR. SMITH:

In *NY* 867993, which the Area Director of Customs, New York, issued to you on November 6, 1991, on behalf of **BNL Limited** and **IABC**, its wholly owned U.S. subsidiary, certain plastic wheels containing antifriction balls were held to be classifiable in subheading 8431.39.00, Harmonized Tariff Schedule of the United States (HTSUS), as other parts suitable for use solely or principally with conveyors of heading 8428. We have reconsidered the classification of two of these articles and now believe that it is incorrect.

Facts:

NY 867993 in part addressed the tariff status of part AF8MDWH and part D2081 HD, described as plastic components designed for overhead conveyors. These were designated as items 1 and 4 in *NY* 867993. The ruling also addressed parts AC8MDP58, a wheel/pulley, and D1029, a plastic yoke, designated as items 2 and 3. The classification of items 2 and 3 is not in issue here.

Part AF8MDWH was described as a circular plastic (acetal copolymer) wheel approximately 2 inches in diameter and containing polished steel antifriction balls. Submitted

specifications list one of its physical characteristics as reduction of friction. Part D2081 HD was described as a plastic (acetal copolymer) wheel with a stainless steel inner race, anti-friction balls, and a threaded shaft. Both wheels are designed to operate at a maximum 100 pound stress capability, and will be mounted into the plastic yoke, part D1029. Two of the plastic yokes are combined into a Y-shaped assembly to form a trolley mechanism designed to support loads while rolling along an I-beam which serves as the track of an overhead chain conveyor in poultry processing plants.

You supported the subheading 8431.39.00, HTSUS, classification on the basis that the articles were designed and manufactured for specific uses as parts of overhead conveyors, and that their physical features prevented their use in any other application.

The provisions under consideration are as follows:

8431	Parts suitable for use solely or principally with the machinery of headings 8425 to 8430:					
8431.39	Other:					
8431.39.00 (now **80**)	Other					
*	*	*	*	*	*	*
8482	Ball or roller bearings, and parts thereof:					
8482.10.10	Ball bearings with integral shafts					
8482.10.50	Other					

Issue:

Whether parts AF8MDWH and D2081 HD are goods of heading 8482.

Law and Analysis:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). GRI 1 states in part that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6.

The **Harmonized Commodity Description and Coding System Explanatory Notes** (**ENs**) constitute the official interpretation of the Harmonized System. While not legally binding, and therefore not dispositive, the **ENs** provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise under the System. Customs believes the **ENs** should always be consulted. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

Relevant **ENs** at p. 1433 state that heading 8482 covers ball, roller, or needle roller type bearings that enable friction to be considerably reduced. They may be designed to give radial support or to resist thrust. Normally, bearings consist of two concentric rings or races enclosing the balls or rollers, and a cage which keeps them in place and ensures that their spacing remains constant.

In articles of this type, the outer plastic portion of the wheel is significantly reinforced in thickness to provide weight-carrying capability and also permits the article to roll on the track of an overhead conveyor. On the underside of this plastic wheel, and integral to it, is a metal piece specially machined to create a smooth, precisioned raceway needed to reduce friction during movement. Known by various names, articles that function to position, hold and guide moving machine parts, as well as reduce friction during such movement, have been held to be ball or roller bearings of heading 8482. *See THK America, Inc. v. United States*, 17 CIT 1169 (1993), and lexicographic sources cited. Parts AF8MDWH and D2081 HD function in this manner.

Goods that are identifiable parts of machines or apparatus of Chapters 84 and 85 are classifiable in accordance with Section XVI, Note 2, HTSUS. Parts that are goods included in any heading of Chapter 84 or Chapter 85 are in all cases to be classified in their respective headings. *See* Note 2(a). Other parts are to be classified with the machine or machines with which they are solely or principally used. *See* Note 2(b). The parts claim under subheading 8431.39.00 (now 80), must fail because parts AF8MDWH and D2081 HD are goods included in heading 8482.

Holding:

Under the authority of GRI 1, the rail rollers are provided for in heading 8482. They are classifiable in subheading 8482.10.50, HTSUS. *NY* 867993, dated November 6, 1991, is modified accordingly.

JOHN DURANT,
Director,
Commercial Rulings Division.

MODIFICATION OF CUSTOMS RULING LETTER RELATING TO BUYING COMMISSIONS

ACTION: Notice of modification of valuation ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), this notice advises parties that Customs is modifying a ruling letter concerning the appraisement of imported merchandise in which a buying commission was considered dutiable. Notice of the proposed modification was published, in the CUSTOMS BULLETIN, Volume 32, Number 25 on June 24, 1998.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after October 19, 1998.

FOR FURTHER INFORMATION CONTACT: Kathleen Clarke, Value Branch, Office of Regulations and Rulings (202) 927–2399.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On June 24, 1998, Customs published a notice in the CUSTOMS BULLETIN, Volume 32, Number 25, proposing to modify Headquarters Ruling Letter (HRL) 545519, issued June 30, 1994, by the Director, Commercial Rulings Division, Office of Regulations and Rulings, in which Customs held that buying commissions calculated by deducting an amount from the total FOB invoice value, were dutiable as part of the price actually paid or payable for the imported merchandise in accordance with section 402(b) of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979 (TAA), codified at 19 U.S.C. 1401a. In reaching its conclusion, the decision in HRL 545519 did not emphasize that the manufacturer's invoices were submitted along with the buying agent's invoices, the buying agency agreements, and proofs of payment. No comments were received in response to the notice.

Pursuant to §625(c)(1), Tariff Act of 1930 (19 U.S.C. §1625(c)(1)), as amended by §623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L.

103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying HRL 545519 to hold that insofar as the *bona fides* of the agency relationship have been substantiated and the submitted manufacturer's invoice reflects the price actually paid or payable without the commissions, such payments are non-dutiable.

Publication of rulings or decisions pursuant to 19 U.S.C. §1625(c)(1) does not constitute a change of practice or position in accordance with §177.10(c)(1), Customs Regulations (19 CFR §177.10(c)(1)).

Dated: July 30, 1998.

THOMAS L. LOBRED,
Acting Director,
International Trade Compliance Division.

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
Washington, DC, July 30, 1998.

RR:IT:VA 547087 KCC
Category: Valuation

PORT DIRECTOR
U.S. CUSTOMS SERVICE
1000 2nd Avenue
Seattle, WA 98104–1049

Re: Modification of HRL 545519; Internal Advice Request 105/93; dutiability of buying commissions; relevance of manufacturers' invoices; *Monarch Luggage*; HRL 545624.

DEAR DIRECTOR:

This decision concerns Headquarters Ruling Letter (HRL) 545519, issued June 30, 1994, as internal advice request 105/93 filed by Billy J. Gwin of Geo. S. Bush & Co., Inc. on behalf of Ace Novelty Co. (Ace). In HRL 545519, it was determined that buying commissions calculated by deducting an amount from the total FOB invoice value, were dutiable as part of the price actually paid or payable for the imported merchandise in accordance with section 402(b) of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979 (TAA), codified at 19 U.S.C. 1401a. We have reviewed HRL 545519 and the proper appraisement is as follows.

Pursuant to §625(c)(1), Tariff Act of 1930 (19 U.S.C. §1625(c)(1)), as amended by §623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), notice of the proposed modification of HRL 545519 was published on June 24, 1998, in the CUSTOMS BULLETIN, Volume 32, Number 25. No comments were received in response to this notice.

Facts:

Invoices prepared by Ace's buying agents were submitted, which itemize the imported merchandise, identify Ace as the purchaser and consignee and specify that the merchandise was shipped on the purchaser's account and risk. They also identify the manufacturer from whom the merchandise is purchased and the number of the purchase order originally issued from Ace that initiated the sale between the manufacturer and Ace. Beside each merchandise itemization, a unit price appears which includes the 12 percent (12%) buying commission payable to the buying agent responsible for preparing the invoice. Above the

unit prices are the words, "INCLUDING OUR BUYING COMMISSION." At the end of the various agents' invoices is a total FOB value, commission included, with the notation, "INCLUDING OUR BUYING COMMISSION." Below the total FOB value, the amount for the buying commission is identified and calculated at twelve percent (12%) of the total FOB value. Below that amount is the figure representing the FOB value less the buying commission, which amount is described on the invoices as either the total Ex-factory or FOB value. Companion invoices prepared by the foreign manufacturers also were presented reflecting FOB prices for the merchandise, without the twelve percent (12%) buying commissions.

Although it was determined in HRL 545519 that there was no question as to the *bona fides* of the buying agents, because the buying commissions were calculated by deducting an amount from the total FOB invoice value, such commissions were found dutiable as part of the price actually paid or payable in accordance with *Monarch Luggage Co., Inc. v. United States*, 13 CIT 523, 715 F. Supp. 1115 (1989). In reaching its conclusion, the decision in HRL 545519 did not emphasize that the manufacturer's invoices were submitted along with the buying agent's invoices, the buying agency agreements, and proofs of payment. Thus, it is not necessary to examine new evidence in deciding this modification.

Issue:

Whether the evidence submitted supports a finding that the subject buying commissions are non-dutiable.

Law and Analysis:

The preferred method of appraising merchandise imported into the United States is transaction value pursuant to section 402(b) of the TAA. Section 402(b)(1) of the TAA provides, in pertinent part, that the transaction value of imported merchandise is the "price actually paid or payable for the merchandise when sold for exportation to the United States" plus the enumerated statutory additions.

The "price actually paid or payable" is defined in section 402(b)(4)(A) of the TAA as the "total payment (whether direct or indirect, and exclusive of any costs, charges, or expenses incurred for transportation, insurance, and related services incident to the international shipment of the merchandise * * *) made, or to be made, for the imported merchandise by the buyer to, or for the benefit of, the seller."

Bona fide buying commissions are not an addition to the price actually paid or payable. *Pier 1 Imports, Inc. v. United States*, 13 CIT 161, 164, 708 F. Supp. 351, 354 (1989); *Rosenthal-Netter, Inc. v. United States*, 12 CIT 77, 78, 679 F. Supp. 21, 23 (1988); *Jay-Arr Slimwear, Inc. v. United States*, 12 CIT 133, 136, 681 F. Supp. 875, 878 (1988).

Initially, we emphasize that the portion of the analysis, in HRL 545519, concerning the *bona fides* of the agency relationship as well as the synopsis of the *Monarch* decision is accurate in all respects. In particular, it was explained that:

> * * * the [*Monarch*] court found that the evidence submitted did establish that the agents were *bona fide* buying agents. However with respect to **certain** entries, the invoices submitted indicated that the commissions were calculated by dividing the FOB price by a specific figure. The commissions were then deducted from the invoiced FOB price of the merchandise. Citing to *BBR Prestressed Tanks, Inc., et al. v. U.S.*, 64 Cust. Ct. 787, 788, A.R.D. 265 (1970), the court found that because the amounts attributable to buying commissions were part of the price actually paid or payable for the merchandise, the amounts were properly included in the dutiable value of the imported merchandise. For the **other entries** made after late 1981, a different invoicing method was used whereby the commission was calculated by multiplying the FOB price by a certain amount, and remitting the commission amount separately by check from the buyer to the agent. Under these circumstances the court found that the commissions became an amount separate from and in addition to the price for the merchandise. Thus, these commissions were * * * [non-dutiable](emphasis added).

HRL 545519 at 4.

Accordingly, the *Monarch* court employed a bifurcated analysis concerning buying commissions, to wit, whether the alleged agent acted at all times as a *bona fide* buying agent and, furthermore, whether the amounts claimed to have been paid as buying commissions were paid as part of the purchase price of the imported merchandise and, in any event, properly included in the appraised value of the merchandise. Based on the facts presented, the *Monarch* court found that while all the attributes of a *bona fide* agent were present, only those transactions entered subsequent to the proper invoicing procedure should not include amounts for the buying commission in the appraised value of the merchandise.

With regard to the instant case, a re-examination of the evidence presented in HRL 545519 leads us to the conclusion that the buying commission payments are not included in the appraised value of the imported merchandise. We concur with HRL 545519 that the alleged agent acted at all times as a *bona fide* buying agent. Thus, the *bona fides* of the agency relationship have been substantiated.

However, unlike HRL 545519, we find that the buying commissions are not included in the price actually paid or payable. The questions to be answered is whether the payment made to the seller for the imported merchandise includes the buying commissions. Specifically, we stress that the term "price actually paid or payable" means the total payment made to, or for the benefit of, the **seller**. 19 U.S.C. 1401a(b)(4). The price actually paid or payable should be reflected in the manufacturer's invoice. In this case, the submitted manufacturer's invoices reflect the price actually paid or payable paid by the importer without the commissions. The agents' invoices clearly indicate that the invoice amounts include the buying commissions. Additionally, we note that the subtracting the buying commission from the prices on the buying agent's invoice leaves a price for each item which corresponds to the prices reflected on the manufacturers' invoices. Thus, the price actually paid or payable in this situation is reflected in the manufacturer's invoice. Accordingly, the instant finding is consistent with HRL 545624, issued October 25, 1994, where Customs found that since the manufacturers' invoice prices did not include an amount for commissions and there was no indication that the additional amounts paid for the buying agent's services inured to, or for the benefit of, the seller, such commissions were not part of the transaction value of the merchandise. *See also*, TAA No. 7 (HRL 542141) dated September 29, 1980. It is our understanding that proof of payment, purchase orders, and other relevant agreements and documentation would not provide evidence contrary to such a finding.

Holding:

Based on the evidence submitted, insofar as the *bona fides* of the agency relationship have been substantiated and the submitted manufacturer's invoice reflects the price actually paid or payable without the commissions, the buying commissions at issue are not included in the appraised value.

HRL 545519 issued June 30, 1994, is modified as set forth above. In accordance with 19 U.S.C. §1625(c)(1), this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN.

THOMAS L. LOBRED,
Acting Director,
International Trade Compliance Division.

REVOCATION OF RULING LETTER RELATING TO TARIFF CLASSIFICATION OF THE HORMONE "LUTEINIZING HORMONE-RELEASING HORMONE (HYDROCHLORIDE SALT)"

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking a ruling pertaining to the tariff classification of luteinizing hormone-releasing hormone (hydrochloride salt) (LHRH HCl) (CAS # 51952–41–1) under the Harmonized Tariff Schedule of the United States (Annotated) (HTSUSA). Notice of the proposed revocation was published on June 24, 1998, in Volume 32, Number 25, of the CUSTOMS BULLETIN. No comments were received in response to this notice.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after October 19, 1998.

FOR FURTHER INFORMATION CONTACT: Michael McManus, General Classification Branch, (202) 927–2346.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On June 24, 1998, Customs published a notice in the CUSTOMS BULLETIN, Volume 32, Number 25, proposing to revoke New York Ruling Letter (NY) A85174, issued July 3, 1996. No comments were received in response to this notice.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking a ruling pertaining to the tariff classification of LHRH HCl also known as gonadorelin.

In NY A85174, Customs ruled that LHRH HCl was classified under subheading 2937.10.0000, HTSUSA, the provision for pituitary (anterior) or similar hormones and their derivatives.

Upon review of this ruling, Customs has discovered an error in the classification of LHRH HCl. This product should have been classified in subheading 2937.99.9550, HTSUSA, the residual provision for hormones not classified elsewhere.

LHRH HCl is a neurohumoral hormone produced in the hypothalamus. Upon release, it causes the pituitary gland to release luteinizing hormone and follicle stimulating hormone, hormones which control de-

velopment in children and fertility in adults. *Complete Drug Reference*, 1997 Ed., United States Pharmacopeia; *Merck Index* 12th ed. As a hormone, LHRH HCl must be classified in one of the three subheadings of heading 2937, HTSUSA: pituitary hormones, adrenal cortical hormones, and other. Inasmuch as it is produced in the hypothalamus, LHRH HCl is not properly classified as a pituitary hormone. Since LHRH HCl is not properly classified as an adrenal cortical hormone, it belongs in the residual provision. Within the residual provision, LHRH HCl is best classified in subheading 2937.99.9550, HTSUSA, as "other: other" because it is neither insulin nor an estrogen and it is not otherwise specifically provided for by an *eo nomine* provision in subheading 2937.99.

Customs is revoking NY A85174 to reflect the proper classification of LHRH HCl. Headquarters Ruling Letter (HQ) 960397, revoking NY A85174, is set forth as an attachment to this document.

Publication of rulings or decisions pursuant to 19 U.S.C. §1625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: July 30, 1998.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
Washington, DC, July 30, 1998.

CLA–2 RR:CR:GC 960397 MGM
Category: Classification
Tariff No. 2937.99.9550

MS. JOAN VON DOEHREN
120 Route 17 North
P.O. Box 1579
Paramus, NJ 07653–1579

Re: Luteinizing hormone-releasing factor (hydrochloride salt) (CAS # 51952–41–1); NY A85174 revoked.

DEAR MS. VON DOEHREN:

This office has determined that New York Ruling Letter (NY) A85174, issued to you on July 3, 1996, concerning the tariff classification of luteinizing hormone-releasing factor (LHRH HCl), is in error. Therefore, this ruling revokes NY A85174.

Pursuant to section 625(c)(1) Tariff Act of 1930 (19 U.S.C. 1625(c)(1)) as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, (Pub. L. 103–182, 107 Stat. 2057, 2186), notice of the proposed revocation of NY A85174 was published on June 24, 1998, in the CUSTOMS BULLETIN, Volume 32, Number 25. No comments were received in response to this notice.

Facts:

In NY A85174, Customs ruled that LHRH HCl would be properly classified under subheading 2937.10.0000, Harmonized Tariff Schedule of the United States (Annotated) (HTSUSA), which provides for pituitary (anterior) or similar hormones, and their derivatives.

Upon review of this ruling, Customs has discovered an error in the classification of LHRH HCl. This product should have been classified in subheading 2937.99.9550, HTSUSA, which provides for other hormones and their derivatives * * *: other: other: other.

Issue:

Whether LHRH HCl is classified in subheading 2937.10.0000, HTSUSA, the provision for pituitary (anterior) or similar hormones, and their derivatives or in subheading 2937.99.9550, HTSUSA, the residual provision.

Law and Analysis:

Merchandise imported into the United States is classified under the HTSUSA. Tariff classification is governed by the principles set forth in the General Rules of Interpretation (GRIs) and, in the absence of special language or context which requires otherwise, by the Additional U.S. Rules of Interpretation. The GRIs and the Additional U.S. Rules of Interpretation are part of the HTSUSA and are to be considered statutory provisions of law for all purposes.

GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and any relative section or chapter notes and, unless otherwise required, according to the remaining GRIs taken in their appropriate order. GRI 6 requires that the classification of goods in the subheadings of headings shall be determined according to the terms of those subheadings, any related subheading notes and *mutatis mutandis*, to the GRIs.

This matter is governed by GRI 6, in that the choice in classification is between two subheadings within heading 2937, HTSUSA. Subheading 2937.10.0000, HTSUSA, provides for "pituitary (anterior) or similar hormones, and their derivatives" while subheading 2937.99.9550, HTSUSA, provides for "other hormones and their derivatives * * *: other: other: other." LHRH HCl is a neurohumoral hormone produced in the hypothalamus. Upon release, it causes the pituitary gland to release luteinizing hormone and follicle stimulating hormone, hormones which control development in children and fertility in adults. *Complete Drug Reference*, 1997 Ed., United States Pharmacopeia; *Merck Index* 12th ed. As a hormone, LHRH HCl must be classified in one of the three subheadings of heading 2937, HTSUSA: pituitary hormones, adrenal cortical hormones, or other. Inasmuch as it is produced in the hypothalamus, LHRH HCl is not properly classified as a pituitary hormone. Since LHRH HCl is not properly classified as an adrenal cortical hormone, it belongs in the residual provision. Within the residual provision, LHRH HCl is best classified in subheading 2937.99.9550, HTSUSA, as "other: other" because it is neither insulin nor an estrogen and it is not otherwise specifically provided for by an *eo nomine* provision in subheading 2937.99.

Holding:

Luteinizing hormone-releasing hormone (hydrochloride salt) is properly classified in subheading 2937.99.9550, HTSUSA.

NY A85174 is revoked. In accordance with 19 U.S.C. §1625(c)(1), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

REVOCATION OF RULING LETTER RELATING TO TARIFF CLASSIFICATION OF THYROTROPIN-RELEASING HORMONE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking a ruling pertaining to the tariff classification of the hormone thyrotropin-releasing hormone (CAS # 24305–27–9) under the Harmonized Tariff Schedule of the United States (Annotated) (HTSUSA). Notice of the proposed revocation was published on June 24, 1998, in Volume 32, Number 25, of the CUSTOMS BULLETIN. No comments were received in response to this notice.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after October 19, 1998.

FOR FURTHER INFORMATION CONTACT: Michael McManus, General Classification Branch, (202) 927–2346.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On June 24, 1998, Customs published a notice in the CUSTOMS BULLETIN, Volume 32, Number 25, proposing to revoke New York Ruling Letter (NY) A85122, issued July 3, 1996. No comments were received in response to this notice.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking a ruling pertaining to the tariff classification of thyrotropin-releasing hormone.

In NY A85122 Customs ruled that thyrotropin-releasing hormone was classified under subheading 2937.10.0000, HTSUSA, the provision for pituitary (anterior) or similar hormones and their derivatives.

Upon review of this ruling, Customs has discovered an error in the classification of thyrotropin-releasing hormone. This product should have been classified in subheading 2937.99.9550, HTSUSA, the residual provision for hormones not classified elsewhere.

Thyrotropin-releasing hormone is a hypothalamic neurohormone which stimulates the release and synthesis of thyrotropin. *The Merck Index*, 12th ed. As a hormone, it must be classified in one of the three subheadings of heading 2937, HTSUSA: pituitary hormones, adrenal cortical hormones, or other. Inasmuch as it is produced in the hypothalamus, thyrotropin-releasing hormone is not properly classified as a pi-

tuitary hormone. Since thyrotropin-releasing hormone is not properly classified as an adrenal cortical hormone, it belongs in the residual provision. Within the residual provision, thyrotropin-releasing hormone is best classified in subheading 2937.99.9550, HTSUSA, as "other: other" because it is neither insulin nor an estrogen and it is not otherwise specifically provided for by an *eo nomine* provision in subheading 2937.99.

Customs is revoking NY A85122 to reflect the proper classification of thyrotropin-releasing hormone. Headquarters Ruling Letter (HQ) 960413, revoking NY A85122, is set forth as an attachment to this document.

Publication of Rulings or decisions pursuant to 19 U.S.C. §1625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: July 31, 1998.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, July 31, 1998.

CLA–2 RR:CR:GC 960413 MGM
Category: Classification
Tariff No. 2937.99.9550

MS. JOAN VON DOEHREN
INTERCHEM CORPORATION
120 Route 17 North
P.O. Box 1579
Paramus, NJ 07653–1579

Re: Thyrotropin-releasing hormone (CAS # 24305–27–9); NY A85122.

DEAR MS. VON DOEHREN:

This office has determined that New York Ruling Letter (NY) A85122, issued to you on July 3, 1996, concerning the tariff classification of thyrotropin-releasing hormone, is in error. Therefore, this ruling revokes NY A85122.

Pursuant to section 625(c)(1) Tariff Act of 1930 (19 U.S.C. 1625(c)(1)) as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, (Pub. L. 103–82, 107 Stat. 2057, 2186), notice of the proposed revocation of NY A85122 was published on June 24, 1998, in the CUSTOMS BULLETIN, Volume 32, Number 25. No comments were received in response to this notice.

Facts:

In NY A85122, Customs ruled that thyrotropin-releasing hormone would be properly classified under subheading 2937.10.0000, Harmonized Tariff Schedule of the United States (Annotated) (HTSUSA), which provides for pituitary (anterior) or similar hormones, and their derivatives.

Upon review of this ruling, Customs has discovered an error in the classification of thyrotropin-releasing hormone. This product should have been classified in subheading

2937.99.9550, HTSUSA, which provides for other hormones and their derivatives * * *: other: other: other.

Issue:

Whether thyrotropin-releasing hormone is classified in subheading 2937.10.0000, HTSUSA, the provision for pituitary (anterior) or similar hormones, and their derivatives or in subheading 2937.99.9550, HTSUSA, the residual provision.

Law and Analysis:

Merchandise imported into the United States is classified under the HTSUSA. Tariff classification is governed by the principles set forth in the General Rules of Interpretation (GRIs) and, in the absence of special language or context which requires otherwise, by the Additional U.S. Ru'es of Interpretation. The GRIs and the Additional U.S. Rules of Interpretation are part of the HTSUSA and are to be considered statutory provisions of law for all purposes.

GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and any relative section or chapter notes and, unless otherwise required, according to the remaining GRIs taken in their appropriate order. GRI 6 requires that the classification of goods in the subheadings of headings shall be determined according to the terms of those subheadings, any related subheading notes and *mutatis mutandis*, to the GRIs.

This matter is governed by GRI 6, in that the choice in classification is between two subheadings within heading 2937, HTSUSA. Subheading 2937.10.0000, HTSUSA, provides for "pituitary (anterior) or similar hormones, and their derivatives" while subheading 2937.99.9550, HTSUSA, provides for "other hormones and their derivatives * * *: other: other: other." Thyrotropin-releasing hormone is a hypothalamic neurohormone which stimulates the release and synthesis of thyrotropin. *The Merck Index*, 12th ed. As a hormone, thyrotropin-releasing hormone must be classified in one of the three subheadings of heading 2937, HTSUSA: pituitary hormones, adrenal cortical hormones, or other. Inasmuch as it is produced in the hypothalamus, thyrotropin-releasing hormone is not properly classified as a pituitary hormone. Since thyrotropin-releasing hormone is not properly classified as an adrenal cortical hormone, it belongs in the residual provision. Within the residual provision, thyrotropin-releasing hormone is best classified in subheading 2937.99.9550, HTSUSA, as "other: other" because it is neither insulin nor an estrogen and it is not specifically otherwise provided for by an *eo nomine* provision in subheading 2937.99.

Holding:

Thyrotropin-releasing hormone is properly classified in subheading 2937.99.9550, HTSUSA.

NY A85122 is revoked. In accordance with 19 U.S.C. §1625(c)(1), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

MODIFICATION OF RULING LETTER RELATING TO TARIFF CLASSIFICATION OF OPTICAL FIBER ADAPTERS AND RECEPTACLES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying a ruling relating to the tariff classification under the Harmonized Tariff Schedules of the United States (HTSUS) of optical fiber adapters and receptacles. These are devices used principally in data communications to facilitate the alignment and interconnection of optical fibers. Notice of the proposed modification was published in the CUSTOMS BULLETIN on July 1, 1998, Volume 32, Number 26. No comments were received in response to the notice.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after October 19, 1998.

FOR FURTHER INFORMATION CONTACT: James A. Seal, Commercial Rulings Division (202) 927–0760.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On July 1, 1998, Customs published a notice in the CUSTOMS BULLETIN, Volume 32, Number 26, proposing to modify *NY* B81965, dated September 12, 1997, which in part classified certain ceramic adapters and receptacles used in the transmission of signals through optical fibers, were classifiable in subheading 6914.90.80, HTSUS, as other ceramic articles not of porcelain or china. No comments were received in response to this notice.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying *NY* B81965 to reflect the proper classification of this merchandise in subheading 6914.90.40, HTSUS, as other ceramic mating sleeves of alumina or zirconia. *HQ* 960922, modifying *NY* B81964 is set forth as the Attachment to this document.

Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: August 3, 1998.

MARVIN AMERNICK,
(for John Durant, Director
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
Washington, DC, August 3, 1998.

CLA–2 RR:CR:GC 960922 JAS
Category: Classification
Tariff No. 6914.90.40

DAVID P. SANDERS, ESQ.
LEBOEUF, LAMB, GREENE & MACRAE L.L.P.
1875 Connecticut Avenue, N.W.
Washington, DC 20009–5728

Re: *NY* B81965 Modified; optical fiber connectors, adapters, and receptacles not incorporating optical elements; ceramic articles used to join and align connectors to facilitate transmission of signals through optical fiber cables; ceramic ferrules of porcelain or china, other ceramic articles, composite goods, essential character, GRI 3; GRI 6.

DEAR MR. SANDERS:

In a letter, dated September 12, 1997, on behalf of Alcoa Fujikura, Ltd., you request reconsideration of a ruling on the classification under the Harmonized Tariff Schedule of the United States (HTSUS), of certain optical fiber adapters and receptacles. You presented additional facts and legal arguments at a meeting in our office on April 23, 1998, which you confirmed in a memorandum of the same date.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed modification of *NY* B81965 was published on July 1, 199, in the CUSTOMS BULLETIN, Volume 32, Number 26. No comments were received in response to that notice.

Facts:

In *NY* B81965, dated February 28, 1997, the Chief, National Commodity Specialist Division, New York, held, among other things, that certain ceramic adapters and receptacles used in the transmission of signals through optical fibers, were classifiable in subheading 6914.90.80, HTSUS, as other ceramic articles not of porcelain or china. The adapters and receptacles in issue were found to be composite goods made up of different components, and that under General Interpretative Rule 3(b), HTSUS, the zirconium oxide split sleeves or mating sleeves in each imparted the essential character to the whole. The adapter model C002499 was held to be classifiable in subheading 7419.99.50, HTSUS, because the mating sleeve was of phosphor bronze. The classification of this article is not in issue here.

The adapters in issue are the models C023450, C042420 and C042404, while the receptacles are the models C024554 and C024562. Each adapter consists of multiple plastic dust protection caps, stainless steel mounting clips, and either two, four or five zirconium oxide tubes called split sleeves or mating sleeves, with an equal number of sleeve holders. All

components are enclosed in a plastic housing. Optical connectors of the same or different sizes are press fit into each end of a split sleeve within each adapter. An optical connector consists of a plastic housing incorporating a ferrule into which an optical fiber is fixed. The function of the adapters in issue is to align the ferrules in both connectors within the split sleeve to position and connect the fibers, thereby enabling the transmission of an optical signal. The receptacles in issue function in the same way to connect standard industry connectors to active devices such as light emitting diodes (LEDs) to permit optical signals to travel between them. The zirconium oxide split sleeves in each adapter and receptacle prevent light loss which would compromise the strength of the optical signal. It is noted that the adapters and receptacles in issue will always have one or more zirconium oxide split sleeves but it is the connectors that incorporate the ferrules.

You contend that the adapters and receptacles in issue are classifiable in subheading 6914.90.40, HTSUS, as this provision, in your opinion, encompasses either ceramic ferrules imported alone, ceramic ferrules imported with mating sleeves, or ceramic mating sleeves of alumina or zirconia imported alone.

The provisions under consideration are as follows:

6914	Other ceramic articles:	
	Of porcelain or china:	
6914.10.40	Ceramic ferrules of porcelain or china, not exceeding 3 mm in diameter or 25 mm in lehgth, having a fiber channel opening and/or ceramic mating sleeves of alumina or zirconia * * *	Free
6914.10.80	Other	
6914.90	Other:	
6914.90.40	Ceramic ferrules of alumina or zirconia, not exceeding 3 mm in diameter or 25 mm in length, having a fiber channel opening and/or ceramic mating sleeves of alumina or zirconia * * *	Free
6914.90.80	Other	

Issue:

Whether the optical fiber adapters and receptacles in issue, classifiable under GRI 3(b) as if consisting only of the split sleeve component of zirconium oxide, are described in subheading 6914.90.40.

Law and Analysis:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). GRI 1 states in part that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6. GRI 6 states, in part, that the classification of goods in the subheadings of a heading shall be in accordance with the terms of those subheadings, and that GRIs 1 through 5 may be applied, with appropriate substitution of terms.

It is well settled that drafters of statutory provisions are presumed to be versed in ordinary rules of grammatical construction. However, where a statutory provision is ambiguous or susceptible of more than one construction, the interpretation that removes the ambiguity and which represents the more likely legislative intent is preferred.

The decision in *NY* B81965 with respect to the adapters and receptacles in issue was predicated on the belief that subheading 6914.90.40, HTSUS, as drafted, encompassed only ceramic ferrules having the requisite dimensions, imported *either* with a fiber channel opening *or* a ceramic mating sleeve of alumina or zirconia. In all cases, it was felt, the ferrule must be present, so that a ceramic mating sleeve, imported alone, or an article classifiable as if consisting only of a ceramic mating sleeve, could not be classified in that subheading.

You now cite a draft memorandum from the United States International Trade Commission (USITC) to the House Ways and Means Committee that, in your opinion, is a source of legislative history that reflects the proper interpretation of the provision. The memorandum provided technical comments on a proposal to create a new heading 9902.69.14, HTSUS, to temporarily suspend duty on ceramic ferrules and mating sleeves of either alumina or zirconia. Although the proposed new heading was never enacted, it is clearly linked to the Presidential Proclamation subsequently issued to create subheadings 6914.10.40

and 6914.90.40. Accordingly, the following explanation, which appears in the draft memorandum under the heading *Product description(s) and uses*, is relevant:

> The subject goods are parts of connectors used to join and align optical fibers. A *ceramic ferrule* is a tubular object whose inside diameter is precisely sized to accommodate a single optical fiber, one of which is inserted at each end of the ferrule. A mating sleeve is a larger tubular object with a longitudinal slit, and is designed to hold a ferrule in place (Emphasis added).

It is clear from the draft memorandum that the connectors are not made in the United States and that the relatively high cost of the ferrules and the mating sleeves represents a large portion of the total cost of the connectors. Thus, the proposed legislation sought duty-free status *both* for the ferrules *and* for the mating sleeves.

The application of ordinary rules of grammatical construction, together with our understanding of the apparent intent of the legislation, as reflected in the draft USITC memorandum, leads us to conclude that subheading 6914.90.40, HTSUS, accords duty-free entry to: (1) separately imported ceramic ferrules of alumina or zirconia having both the requisite dimensions and a fiber channel opening; (2) such ferrules and ceramic mating sleeves of alumina or zirconia imported together, whether or not in even numbers; and, (3) ceramic mating sleeves of alumina or zirconia imported separately.

Zirconium oxide mating sleeves are described both in subheading 6914.10.40, HTSUS, and in subheading 6914.90.40, HTSUS. Neither subheading provides a description for the good that is more specific than the other. Under the authority of GRI 3(c), HTSUS, made applicable at the subheading level by GRI 6, the optical fiber adapters and receptacles in issue, classifiable as if consisting of the zirconium oxide mating sleeves, are classifiable in subheading 6914.90.40, HTSUS, as that subheading occurs last in numerical order among those which equally merit consideration.

Holding:

Optical fiber adapter models C023450, C042420 and C042404, and receptacle models C024554 and C024562, all classifiable as if consisting only of a zirconium oxide mating sleeve, are provided for in heading 6914. They are classifiable in subheading 6914.90.40, HTSUS.

NY B81965, dated September 12, 1997, is modified accordingly. In accordance with 19 U.S.C. 1625(c)(1), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

MODIFICATION AND REVOCATION OF RULING LETTERS RELATING TO TARIFF CLASSIFICATION OF SIGNAL GENERATORS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of modification/revocation of tariff classification ruling letters.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying one ruling and revoking another ruling relating to the tariff classification under the Harmonized Tariff Schedule of the United States (HTSUS) of signal generators. These are apparatus that produce electrical signals of an assignable magnitude and frequency that are used by other equipment or apparatus that measures or checks the performance of various electrical systems.

Notice of the proposed modification and revocation was published on July 1, 1998, in the CUSTOMS BULLETIN, Volume 32, Number 26. No comments were received in response to correctness of the proposed modification and revocation.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after October 19, 1998.

FOR FURTHER INFORMATION CONTACT: James A. Seal, Commercial Rulings Division (202) 927–0760.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On July 1, 1998, Customs published a notice in the CUSTOMS BULLETIN, Volume 32, Number 26, proposing to modify *PD* B88154, dated August 12, 1997, and revoke *NY* C86285, dated April 30, 1998, both of which classified signal generators as electrical machines and apparatus having individual functions, not specified or included wlsewhere in Chapter 85, in subheading 8543.20.00, Harmonized Tariff Schedule of the United States (HTSUS). No comments were received in response to the notice.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying *PD* B88154 and revoking *NY* C86285 to reflect the proper classification of signal generators in subheading 9030.89.00, HTSUS, a provision for other instruments and apparatus for measuring or checking electrical quantities. *HQ* 961888, modifying *PD* B88154, and *HQ* 961882 revoking *NY* C86285 are set forth as Attachments A and B to this document, respectively.

Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: August 3, 1998.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
Washington, DC, August 3, 1998.

CLA–2 RR:CR:GC 961888 JAS
Category: Classification
Tariff No. 9030.89.00

MR. NATHAN LAMPERT
TECHCOMP INTERNATIONAL, LTD.
5007 Concord Avenue
Great Neck, NY 11020

Re: *PD* B88154 Modified; bit pattern generator, signal-producing device used in testing communications equipment; measuring or checking instrument; instrument that carries out steps in a process of inspecting goods, checking, *United States v. Corning Glass Works*; Section XVI, Note 1(m); *HQ* 954856.

DEAR MR. LAMPERT:

In *PD* B88154, which the Area Port Director of Customs, Washington, D.C., issued to you on August 12, 1997, the model SHF BPG20GIG bit pattern generator was held to be classifiable in subheading 8543.20.00, Harmonized Tariff Schedule of the United States (HTSUS), as other electrical machines and apparatus, not specified or included elsewhere in Chapter 85. The classification expressed in *PD* B88154 with respect to the model SHF EA20GIG error analyzer (EA) remains unaffected and is not in issue here.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed modification of *PD* B88154 was published on July 1, 1998, in the CUSTOMS BULLETIN, Volume 32, Number 26. No comments were received in response to that notice.

Facts:

The model SHF BPG20GIG bit pattern generator (BPG), is described as being used in testing communications equipment. The device sends either an electrical or optical signal to the device being tested and also to the EA which compares the signals. *PD* B88154 contained no further description of the BPG. However, available information suggests the BPG is a type of signal generator which performs no independent measuring or checking function; rather, other instruments like the EA utilize the signals it produces to measure or check the performance of various electronic systems.

Issue:

Whether the BPG in issue is a checking instrument of heading 9030.

Law and Analysis:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). GRI 1 states in

part that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6.

The **Harmonized Commodity Description and Coding System Explanatory Notes** (**ENs**) constitute the official interpretation of the Harmonized System. While not legally binding on the contracting parties, and therefore not dispositive, the **ENs** provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise under the System. Customs believes the **ENs** should always be consulted. *See* T.D. 89–80. 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

Relevant heading 85.43 **ENs**, at p. 1518 and 1519, state the heading covers all electrical appliances and apparatus not falling in any other heading of Chapter 85, nor covered more specifically by a heading of any other Chapter of the Nomenclature, nor excluded by an applicable Section XVI legal note.

Section XVI, Note 1(m), HTSUS, excludes from that Section goods of Chapter 90. The issue, then, is whether there exists any provision in Chapter 90 that describes the BPG under consideration. In this regard, other **ENs**, at p. 1652, contain the following statement regarding the scope of heading 90.30 "Apart from the above-mentioned types of instruments or apparatus which generally ***effect*** direct measurements, the heading also includes those which supply the operator with certain data ***from which*** the quantity to be measured can be calculated (comparative method)." (Emphasis added). While not necessarily conclusive, these **ENs** suggest that heading 9030 encompasses not only instruments and apparatus which directly perform a measuring or checking function, but also those which generate electrical signals utilized by other instruments and apparatus that do perform such measuring or checking functions.

On a case-by-case basis, prior administrative and judicial decisions should be considered instructive in interpreting provisions of the HTSUS, particularly where the nomenclature previously interpreted in those decisions remains unchanged and no dissimilar interpretation is required by the text of the HTSUS. In this respect, the Court of Customs and Patent Appeals (now the Court of Appeals for the Federal Circuit) in *United States v. Corning Glass Works*, C.D. 4716, *rev'd.*, C.A.D. 1216 (1978), considered whether ampul inspection machines were measuring or checking instruments under a nearly identical provision of the Tariff Schedules of the United States (TSUS), the HTSUS predecessor tariff code. The Court recited its understanding of the common meaning of the term "checking" and concluded it encompasses machines that carry out steps in a process for inspecting ampuls to determine whether they conform to an imperfection-free standard. Limiting the provision to devices that (actually) measure or verify the accuracy of a measurement, the Court concluded, improperly renders "checking" superfluous. We find this decision instructive in determining the scope of heading 9030, particularly when read in conjunction with the referenced 90.30 **ENs**. *See* also *HQ* 954856, dated September 10, 1993, and cases cited. For these reasons, we conclude that the BPG in issue here is provided for in heading 9030. Section XVI, Note 1(m) thus eliminates heading 8543 from consideration.

Holding:

Under the authority of GRI 1, the model SHF BPG20GIG bit pattern generator is provided for in heading 9030. It is classifiable in subheading 9030.89.00, HTSUS, as other instruments and apparatus. The rate of duty is 2.3 percent ad valorem.

PD B88154, dated August 12, 1997, is modified accordingly. In accordance with 19 U.S.C. 1625(c)(1), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
Washington, DC, August 3, 1998.

CLA–2 RR:CR:GC 961882 JAS
Category: Classification
Tariff No. 9030.89.00

MR. ED OHLMANN
TEKTRONIX, INC.
P.O. Box 500
Beaverton, OR 97077–0001

Re: *NY* C86285 Revoked; signal generator, signal-producing device for testing the accuracy of receiver devices; measuring or checking instrument; instrument that carries out steps in a process for inspecting goods, checking, *United States v. Corning Glass Works*; Section XVI, Note 1(m); *HQ* 954856.

DEAR MR. OHLMANN:

In *NY* C86285, which the Director, National Commodity Specialist Division, New York, issued to you on April 30, 1998, signal generator models SME03, SMIQ02, SMIQ03, and R3561L, were held to be classifiable in subheading 8543.20.00, Harmonized Tariff Schedule of the United States (HTSUS), as other electrical machines and apparatus, not specified or included elsewhere in Chapter 85.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed modification of *NY* C86285 was published on July 1, 1998, in the CUSTOMS BULLETIN, Volume 32, Number 26. No comments were received in response to that notice.

Facts:

The merchandise in issue, signal generators or function generators, are electronic instruments that produce periodic voltage or current waveforms, signals or pulses, that are used in testing and calibration applications for a variety of electronic equipment. These signal generators perform no independent measuring or checking function; rather, other instruments utilize the signals they produce to measure or check the performance of various electronic systems.

Issue:

Whether the signal generators in issue are checking instruments of heading 9030.

Law and Analysis:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). GRI 1 states in part that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6.

The **Harmonized Commodity Description and Coding System Explanatory Notes** (**ENs**) constitute the official interpretation of the Harmonized System. While not legally binding on the contracting parties, and therefore not dispositive, the **ENs** provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise under the System. Customs believes the **ENs** should always be consulted. *See* T.D. 89–80. 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

Relevant heading 85.43 **ENs**, at p. 1518 and 1519, state the heading covers all electrical appliances and apparatus not falling in any other heading of Chapter 85, nor covered more specifically by a heading of any other Chapter of the Nomenclature, nor excluded by an applicable Section XVI legal note.

Section XVI, Note 1(m), HTSUS, excludes from that Section goods of Chapter 90. The issue, then, is whether there exists any provision Chapter 90 that describes the signal generators under consideration. In this regard, other **ENs**, at p. 1652, contain the following statement regarding the scope of heading 90.30 "Apart from the above-mentioned types of instruments or apparatus which generally ***effect*** direct measurements, the heading also includes those which supply the operator with certain data ***from which*** the quantity to be

measured can be calculated (comparative method)." (Emphasis added.) While not necessarily conclusive, these **ENs** suggest that heading 9030 encompasses not only instruments and apparatus which directly perform a measuring or checking function, but also those which generate electrical signals utilized by other instruments and apparatus that do perform such measuring or checking functions.

On a case-by-case basis, prior administrative and judicial decisions should be considered instructive in interpreting provisions of the HTSUS, particularly where the nomenclature previously interpreted in those decisions remains unchanged and no dissimilar interpretation is required by the text of the HTSUS. In this respect, the Court of Customs and Patent Appeals (now the Court of Appeals for the Federal Circuit) in *United States v. Corning Glass Works*, C.D. 4716, *rev'd.*, C.A.D. 1216 (1978), considered whether ampul inspection machines were measuring or checking instruments under a nearly identical provision of the Tariff Schedules of the United States (TSUS), the HTSUS predecessor tariff code. The Court recited its understanding of the common meaning of the term "checking" and concluded it encompasses machines that carry out steps in a process for inspecting ampuls to determine whether they conform to an imperfection-free standard. Limiting the provision to devices that (actually) measure or verify the accuracy of a measurement, the Court concluded, improperly renders "checking" superfluous. We find this decision instructive in determining the scope of heading 9030, particularly when read in conjunction with the referenced 90.30 **ENs**. *See* also *HQ* 954856, dated September 10, 1993, and cases cited. For these reasons, the signal generators in issue are provided for in heading 9030. Section XVI, Note 1(m) thus eliminates heading 8543 from consideration.

Holding:

Under the authority of GRI 1, signal generator models SME03, SMIQ02, SMIQ03, and R3561L, are provided for in heading 9030. They are classifiable in subheading 9030.89.00, HTSUS, as other instruments and apparatus. The rate of duty is 2.3 percent ad valorem.

NY C86285, dated April 30, 1998, is revoked. In accordance with 19 U.S.C. 1625(c)(1), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

REVOCATION OF RULING LETTER RELATING TO TARIFF CLASSIFICATION OF A PORTFOLIO WITH WRITING PAD

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking a ruling letter pertaining to the tariff classification of a portfolio with a writing pad. The merchandise consists of a lined writing pad that is attached to the interior side of a zippered case. The case is composed of 100 percent polyester textile material with a leather-like trim of plastics. Comments were invited with respect to the correctness of the proposed revocation.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after October 19, 1998.

FOR FURTHER INFORMATION CONTACT: Greg Deutsch, Textile Branch (202) 927–2302.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On July 1, 1998, Customs published a notice in the CUSTOMS BULLETIN, Volume 32, Number 26, proposing to revoke a ruling letter pertaining to the tariff classification of a portfolio with a writing pad. One comment was received in response to this notice.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking a ruling pertaining to the tariff classification of a writing pad enclosed in a zippered case.

In New York Ruling Letter (NY) C83772, dated February 2, 1998, merchandise at issue was classified in subheading 4202.12.8030, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), textile category 670, the provision for "Trunks * * * attache cases, briefcases, school satchels and similar containers: With outer surface of textile materials: Other, Attache cases * * * occupational luggage cases and similar containers: Other: Of man-made fibers."

It is now Customs position that the article described above is principally designed and intended to provide a convenient and organized method by which to write and/or take notes in various locations and circumstances, and that it is classified in subheading 4820.10.2020, HTSUSA, the provision for "Registers * * * diaries and similar articles: Diaries * * * and similar articles, Memorandum pads, letter pads and similar articles."

Customs is revoking NY C83772, in order to classify the merchandise in subheading 4820.10.2020, HTSUSA. Headquarters Ruling Letter (HQ) 961418, revoking NY C83772, is set forth as the "Attachment " to this document.

Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: August 4, 1998.

JOHN E. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
Washington, DC, August 4, 1998.

CLA–2 RR:CR:TE 961418 GGD
Category: Classification
Tariff No. 4820.10.2020

PAULA M. CONNELLY, ESQUIRE
MIDDLETON & SHRULL
44 Mall Road, Suite 208
Burlington, MA 01803–4530

Re: Revocation of New York Ruling Letter (NY) C83772; articles of stationery; letter pads; memorandum pads; portfolio; not attache case, briefcase, school satchel; Headings 4820, 4202; *Avenues in Leather v. United States*, Slip Op. 98–54, Decided April 24, 1998.

DEAR MS. CONNELLY:

In New York Ruling Letter (NY) C83772, issued February 2, 1998, on behalf of The Gem Group, Incorporated, Customs classified a portfolio with writing pad in subheading 4202.12.8030, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), textile category 670, which provides for "Trunks * * * attache cases, briefcases, school satchels and similar containers: With outer surface of textile materials: Other, Attache cases * * * occupational luggage cases and similar containers: Other: Of man-made fibers." We have reviewed that ruling and have found it to be in error. Therefore, this ruling revokes NY C83772.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed revocation of NY C83772 was published on July 1, 1998, in the CUSTOMS BULLETIN, Volume 32, Number 26.

Facts:

The goods at issue, although identified by several different style numbers (2550, 2551, 2552, and 2553), apparently differ from each other only in the color of their fabric. The merchandise is described as a "padfolio" and consists of a lined memorandum pad or writing pad (which measures approximately 8½ inches in width by 11¾ inches in height by ¼ inch in thickness) that is attached to the right interior side of a zippered jacket or case. The jack-

et, with pad inserted, measures approximately 13 inches in height by 10½ inches in width by 1 inch in depth (in the closed position). The case is zippered on 3 sides and is composed of 100 percent polyester textile material with a leather-like trim of plastics.

The interior left side of the case features 2 flat, full-width slots for papers, 1 zippered, full-width pocket, and 6 slots (1 with a see-through plastic window) for business or credit cards. There is a pen holder sewn onto the interior spine. The article's exterior front has 1 flat, full-width slot.

Issue:

Whether the article is classified in subheading 4202.12.8030, HTSUSA, the provision for attache cases, briefcases, school satchels, and similar containers; or in subheading 4820.10.2020, HTSUSA, the provision for letter pads, memorandum pads, and other articles of stationery, including jackets.

Law and Analysis:

Classification under the HTSUS is made in accordance with the General Rules of Interpretation (GRI). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied. The Explanatory Notes (EN) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUS by offering guidance in understanding the scope of the headings and GRI.

Among other merchandise, chapter 48, HTSUS, covers articles of paper or of paperboard. Note 1(h) to chapter 48, HTSUS, states that "[t]his chapter does not cover: Articles of heading 4202 (for example, travel goods)." Among the items covered by heading 4820, HTSUS, are notebooks, letter pads, memorandum pads, diaries and similar articles, binders (looseleaf or other), folders * * * and other articles of stationery * * * including cover boards and book jackets * * *. The EN to heading 4820 indicate that the heading covers various articles of stationery including (in addition to the examples noted above) notebooks of all kinds, file covers, files (other than box files), and portfolios. The EN also suggest that the goods of the heading may be bound with materials other than paper (e.g., leather, plastics or textile material) and have reinforcements or fittings of metal, plastics, etc.

Heading 4202, HTSUS, provides, in part, for attache cases, briefcases, and similar containers. The exemplars named in heading 4202 have in common the purpose of organizing, storing, protecting, and carrying various items. EN (c) to heading 4202 indicates that the heading does not cover articles which, although they may have the character of containers, are not similar to those enumerated in the heading, for example, book covers and reading jackets, file-covers, document-jackets * * * and which are wholly or mainly covered with leather, sheeting of plastics, etc. Such articles fall in heading 4205 if made of (or covered with) leather or composition leather, and in other chapters if made of (or covered with) other materials.

In several Headquarters Ruling Letters (HQ), Customs has considered the classification of goods featuring certain characteristics common to the enumerated exemplars of headings 4202 and 4820, HTSUS. In HQ 959791 and HQ 959792, dated February 11, 1997, and issued to modify HQ 955655 and HQ 955656 (dated July 14, 1995), respectively, this office found that competition between headings 4202 and 4820 was resolved by note 1(g) to chapter 48 (now note 1(**h**) to chapter 48), which excludes articles of heading 4202 from Chapter 48. We noted the requirement of GRI 1, that "classification shall be determined according to the terms of the headings and any relative section or chapter notes," and that other GRI may be used "provided such headings or notes do not otherwise require."

Since the exclusionary note to chapter 48, HTSUS, did require that other GRI not be used to determine classification, the fact that certain of the articles subject to HQ 955655 and HQ 955656 were prima facie classifiable in heading 4202, should have precluded classification of those goods under heading 4820, HTSUS. Analysis pursuant to any GRI other than GRI 1 was therefore inappropriate. On that basis, HQ 955655 and HQ 955656 were modified by HQ 959791 and HQ 959792, respectively. The above analysis was reiterated and fully supported in a decision by the Court of International Trade (CIT) in *Avenues in Leather v. United States*, Slip Op. 98–54, decided April 24, 1998 (hereinafter *Avenues*).

There remain a small number of rulings in which the exclusionary note to chapter 48 was applicable but **not** cited, and in which articles were found to be prima facie classifiable un-

der both headings 4202 and 4820, HTSUS. In those rulings, the exclusionary note should have been applied to preclude classification within chapter 48. Rulings that have been issued by Customs under the provisions of 19 CFR Parts 174 or 177, that are inconsistent with the principles of the *Avenues* decision are revoked/modified by operation of law.

With regard to whether the "padfolio" is prima facie classifiable under heading 4202, HTSUS, it must be determined whether the article merely has the character of a 4202 container, or whether its purpose is to organize, store, protect, and carry various items. The "padfolio" is designed to organize and perhaps protect small and/or flat items in addition to the writing pad. The case's depth of only 1 inch, however, and its lack of handles or straps, indicate that the article is not designed to easily store, protect, and carry additional items such as a newspaper, a book, and/or other objects normally carried in an attache case or briefcase. Although the case has the character of a container, with perhaps more features than a simple jacket or cover, it does not have the requisite physical attributes Customs has found common to the containers of heading 4202. We find that the jacket's added features serve to enhance the "padfolio's" primary purpose, which is to provide a convenient and organized method by which to take notes in various locations under a variety of circumstances.

In HQ 956940, issued November 25, 1994, this office classified in subheading 4820.10.2020, HTSUSA, two styles of portfolios whose dimensions (13½ inches by 10 inches by 1 inch), features (zippered closure, pockets, slots, and pen holder), and contents (an 8½ inch by 11 inch writing pad) were essentially the same as those of the "padfolio." Although those cases also possessed some features that might be found in an attache case, it was noted that the exterior and interior pockets were essentially flat and suitable only for loose papers, business cards, and other small, flat items. We concluded that the cases functioned primarily as organizational aids for note taking and that they retained the character of jackets and covers that are not covered by heading 4202. Since heading 4820 covers letter pads, memorandum pads, and other articles of stationery with jackets or covers, the pad and its case, as a whole, constitute an article of stationery. The "padfolio" is classified in subheading 4820.10.2020, HTSUSA.

Holding:

The zippered portfolio with pad, identified as a "padfolio," and further identified by style nos. 2550, 2551, 2552, and 2553, is classified in subheading 4820.10.2020, HTSUSA, the provision for "Registers * * * diaries and similar articles: Diaries * * * and similar articles, Memorandum pads, letter pads and similar articles." The general column one duty rate is 2.8 percent ad valorem.

NY C83772, issued February 2, 1998, is hereby revoked. In accordance with 19 U.S.C. 1625(c)(1), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

JOHN E. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Gregory W. Carman

Judges

Jane A. Restani
Thomas J. Aquilino, Jr.
Richard W. Goldberg
Donald C. Pogue
Evan J. Wallach
Judith M. Barzilay
Delissa Anne Ridgway

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Dominick L. DiCarlo

Nicholas Tsoucalas

R. Kenton Musgrave

Clerk

Raymond F. Burghardt

Decisions of the United States Court of International Trade

(Slip Op. 98–101)

MEAD CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 95–12–01783

[Defendant's motion for summary judgment granted on the ground that, as a matter of law, imported books whose main purpose is the notation of daily activity are "diaries," notwithstanding the inclusion of supplementary material such as pages for addresses and telephone numbers. In addition, the court finds that such diaries, when held in ring binders, are "bound" within the meaning of the tariff law even though the pages are removable.]

(Dated July 14, 1998)

Lamb & Lerch *(Sidney H. Kuflik)*, for plaintiff.

Frank W. Hunger, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office; Civil Division, Dept. of Justice, Commerce Litigation Branch *(Amy M. Rubin)*, and Office of Assistant Chief Counsel, International Trade Litigation, United States Customs Service *(Mark G. Nackman)*, for defendant.

OPINION AND ORDER

WATSON, *Senior Judge:* This action involves the tariff classification of imported loose-leaf books containing calendars, room for daily notes, telephone numbers, addresses and notepads. This sort of product originated in England and is probably best known under the trademark of Filofax.[1]

The importations were classified as bound diaries under Subheading 4820.10.20 of the Harmonized Tariff Schedules of the United States ("HTSUS"). That provision, in context, reads as follows:

4820	Registers, account books, notebooks, order books, receipt books, letter pads, memorandum pads, diaries and similar articles, exercise books, blotting pads, binders (looseleaf or other), folders, file covers, man-

[1] Filofax, Inc., importer and U.S. distributor of the "Filofax" line of products, has filed an amicus curiae brief. It did so primarily to make the point, hereby acknowledged, that "Filofax" is a registered trademark, properly used only in connection with Filofax products. It is not a generic term for the type of products involved in this case. As for the classification issues involved herein, Filofax is pursuing its own actions with respect to the classification of its products.

	ifold business forms, interleaved carbon sets and other articles of stationery, of paper or paperboard; albums for samples or for collections and book covers (including cover boards and book jackets) of paper or paperboard:	
4820.10	Registers, account books, notebooks, order books, receipt books, letter pads, memorandum pads, diaries and similar articles:	
CLASSIFIED:		
4820.10.20	Diaries, notebooks and address books, bound; memorandum pads, letter pads and similar articles	3.2%
CLAIMED:		
4820.10.40	Other	Free

Mead has moved for partial summary judgment with respect to two causes of action, first, that the importations are not "diaries" and, second, that the importations are not "bound." A third cause of action, relating to two of the imported styles, in which the loose-leaf binder is not riveted to the jacket cover, are not included in plaintiff's motion. The government's cross-motion covers the entire action and seeks summary judgment that all the importations are bound diaries as a matter of law and were properly classified as such. The parties agree that the resolution of this action depends on the determination of the meaning of the words "diary" and "bound" as used in the relevant subheading.

Plaintiff's first argument is that the importations are not diaries within the meaning of Subheading 4820.10.20. The Court notes that, if this is so, they would not be classifiable as similar to diaries under that subheading even though the subheading ends with the phrase "and similar articles." This is so because, unlike Subheading 4820.10, the phrase "and similar articles" in Subheading 4820.10.20 does not refer back to diaries. The semicolon in that subheading breaks it into separate units and only memorandum pads and notepads are the subjects of the final phrase "and similar articles." In other words, if the importations are similar to diaries, but not actually diaries, they would not fit into subheading 4820.10.20 and plaintiff's claim would be correct.

Both parties argue that their position is supported by prior case law. However, in the opinion of the Court, the case law supports the position of the government on the first issue. In other words, the importations are within the tariff understanding of the term "diaries."

In *Fred Baumgarten v. United States*, 49 Cust. Ct. 275, Abstract No. 67150 (1962), the importation was described as follows:

> The imported article, as represented by plaintiff's exhibit 1, is a plastic-covered book, approximately 4-1/4 by 7-3/8 inches in dimensions. Its first few pages contain, successively, the date "1961," the notation "Personal Memoranda," calendars for the years 1960, 1961, and 1962, and a few statistical tables. The following 20-odd pages contain spaces for addresses and telephone numbers, each page more or less set aside for each letter of the alphabet. The remaining portion of the book consists of ruled pages allocated to the

> days of the year and the hours of the day and each headed with calendars for the current and following months. A blank-lined page, inserted at the end of each month's section, is captioned "Notes."

The court held that the distinguishing feature of a diary was "its suitability for the receipt of daily notations" and found that "[b]y virtue of the allocation of spaces for hourly entries during the course of each day of the year, the books are designed for that very purpose." It should be noted that the presence of pages for addresses and telephone numbers did not affect the court's conclusion in that case.

In *Brooks Bros. v. United States*, 68 Cust. Ct. 91, C.D. 4342 (1972) the court had before it an importation called the Economist Diary, a spiral bound book offered and sold as a diary with "more blank pages, used for recording events and appointments, than there are pages containing information." The court found that the diary portion was the essential or indispensable part of the importation and was therefore controlling of its classification.

In *Charles Scribner's Sons v. United States*, 6 CIT 168, 574 F. Supp. 1058 (1979) the court overturned the classification of a product as a diary under Item 256.56 of the Tariff Schedules of the United States ("TSUS") in favor of classification as a calendar under Item 274.10. The article in question consisted of a book described as an engagement calendar for the year 1979. The book consisted of photographs, each photograph occupying one page and facing another page on which a calendar was devoted to the seven days of a week. The book covered fifty-three weeks in all. The court found that the space allocated to daily notation was "minuscule, measuring approximately one-inch by 4 13/16 inches, and was intended for a notation of no more than a sentence or two." The court further found that the essential purpose of the book was to "convey high-quality Sierra Club photography in the form of a calendar."

The common thread in these cases is the understanding that "diaries" are articles whose principle purpose is to allow a person to make daily notations concerning events of importance. Articles may be diaries even if they contain supplementary material of a different type, such as useful printed information or addresses and telephone numbers. It can therefore be fairly concluded that tariff language adopted with knowledge of these judicial precedents maintains the understanding inherent in those decisions. *Central Products Co. v. United States*, 20 CIT ____, 936 F. Sup. 1002, 1006–7 (1996).

Plaintiff also argues that the diary provision in the HTSUS differs from prior tariff provisions sufficiently to make cases decided under earlier tariff laws inapplicable. Plaintiff points to the fact that the term "diary" in Item 256.56 of the TSUS was an eo nomine provision including all forms of a diary. Under the HTSUS, contends plaintiff, articles "similar" to a diary are "other" than diaries and have a separate provision in Subheading 4820.10.40.

This line of reasoning implies that articles with special features other than those purely dedicated to daily notation may be similar to diaries, but not actually diaries. This argument would be persuasive if it appeared that the provision for "other" articles similar to diaries would be empty or meaningless unless articles such as these came within its ambit. But the government points out that there exists a category of merchandise more remote from "pure" diaries than the importations but still sufficiently close to be called "similar." Thus, in HQ 955199 of January 24, 1994 (defendant's Exhibit P) the Customs Service issued binding classification rulings that a small diary-like book entitled "Special Occasion Book," devoted to making notes for "recording the name, date, occasion and gift idea for special dates" and a book called "Car Care Planner" devoted to the entry of information related to the maintenance of a car were similar to diaries and therefor came within the scope of "other" articles under Subheading 4820.10.40. They were not actually diaries, reasoned the ruling, because their usefulness was limited to special situations.

The rationale used in that ruling is persuasive and provides reassurance that the residual provision for "other" articles in Subheading 4820.10.40 need not be read as covering these importations out of concern that otherwise the subheading would cover nothing at all.

As is often the case, the exhibits are potent evidence. Examination of them leads the Court to conclude that the importations are forms of diaries rather than articles similar to diaries. Their use for notational purposes is not confined to a limited phase of human life or to a narrow area of activity. They are designed for notations concerning the full range of daily experience. As such, they fall within the meaning of the term "diaries" notwithstanding the fact that they contain supplementary material.

In the second stage of this dispute, the success of plaintiff's claim depends on whether or not the diaries are "bound" within the meaning of the subheading in which they were classified.

On this question the plaintiff argues that the meaning of "bound" ought to be derived from the permanent form of attachment demanded of books in *Overton & Co. v. United States*, 22 Treas. Dec. 437, T.D. 3237 (1912). That was a decision of the Board of General Appraisers in which General Appraiser Israel F. Fischer (later to be Chief Justice of the United States Customs Court in its first years) held that permanent binding was the distinction between a book and a booklet. In that decision it was held that small books for such purposes as the recording of weddings or the progress of a baby's growth were books under paragraph 416 of the Tariff Act of 1909 rather than booklets under paragraph 412 because they were "firmly and permanently stitched and bound small books, such as are the product of the bookbinders art."

In that case "booklets" were understood to be "an article used for greeting or souvenir purposes, sold and dealt in by art dealers and statio-

ners, and made up of several leaves or inserts flimsily fastened within a folder of paper or other material."

The Court is mindful of the salutary principle that a continuity of meaning should be maintained from one tariff act to another if Congress has not indicated otherwise. *Hemscheidt Corp. v. United States*, 72 F.3d 868 (Fed. Cir. 1995). However, it cannot be said that the *Overton* decision spoke to the general meaning of the term "bound" as it might be used in a statute. It simply decided that the distinction between a book and booklet lay in the relative permanence of the binding. This is not the sort of judicial decision that fixes statutory terminology so as to allow the court to reason that the legislators must have later used "bound" in the sense of articles that are irremovably joined to one another.

Nor can it be said that the later use of the term "bound" in the Tariff Schedules of the United States or the present HTSUS was so specifically linked to the field of book manufacture that specialized dictionary definitions of the term or bookbinding expertise ought to apply. The tariff provisions here under consideration cover a wide variety of book and non-book articles. Even those that are in book form are not the traditional books of the bookbinding trade. It follows that in these circumstances, the term "bound" should be given its common meaning rather than one associated with the trade of book manufacture. The common meaning of "bound" is fastened. The irrevocability of the fastening is not important so long as it goes beyond the transitory role of packaging.

For the reasons given above, it is the opinion of the Court that the importations at issue are bound diaries within the meaning of Subheading 4820.10.20 of the HTSUS. Consequently, defendant's motion for summary judgment will be granted.

(Slip Op. 98–102)

SKECHERS U.S.A., INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Case No. 97–01–00149

(Dated July 15, 1998)

ORDER

MUSGRAVE, *Judge:* Upon consideration of Plaintiff's Motion to Sever and Dismiss those matters pertaining to Entry No. 175-0740439–4, which was challenged by way of Protest No. 2720–96–101165, and determining that the motion should be granted, it is hereby:

ORDERED that all matters pertaining to Entry No. 175–0740439–4 be severed from this case and established as a separate case, the file number of which shall be 97–01–00149S.

ORDERED that the initial filing fees which were paid at the time the summons in Case No. 97–01–00149 was filed need not be tendered again.

ORDERED that Case No. 97–01–00149S is dismissed.

NOTE: This is to advise that Slip Op. 98–103 is not available for publication at this time due to the confidential nature of the document. A public version of the document will be released and published in the CUSTOMS BULLETIN when available.

(Slip Op. 98–103)

INTERNATIONAL UNION, ET AL., PLAINTIFFS *v.* ROBERT REICH, DEFENDANT

Court No. 96–04–01141

(Dated July 17, 1998)

(Slip Op. 98–104)

ASOCIACION COLOMBIANA DE EXPORTADORES DE FLORES, ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND FLORAL TRADE COUNCIL, DEFENDANT-INTERVENOR

Consolidated Court No. 96–09–02209

[Plaintiffs' motion for rehearing and reconsideration of judgment denied.]

(Decided July 20, 1998)

Arnold & Porter, (Michael T. Shor) for Plaintiffs Asocolflores and the Flores del Rio Group.

Frank W. Hunger, Assistant Attorney General of the United States; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Velta A. Melnbrencis*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice; Of Counsel, *Lucius B. Lau*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, for Defendant; *Karen L. Band*, Attorney-Advisor, Office of the Chief Counsel for Import Administration, Department of Commerce, for Defendant.

Stewart and Stewart, (Mara Burr, James R. Cannon, Jr., Amy S. Dwyer, Terence P. Stewart) for Defendant-Intervenor Floral Trade Council.

MEMORANDUM OPINION AND ORDER

POGUE, *Judge:* On April 23, 1998, pursuant to U.S. CIT Rule 59(a), Asocolflores, AFIF, individual Colombian producers of flowers ("Asocolflores"), and the Flores del Rio Group (collectively "Plaintiffs"), filed a motion for reconsideration and/or rehearing of the Court's decision in *Asociacion Colombiana de Exportadores de Flores v. United States*, 22 CIT ____, slip op. 98–33 (Mar. 25, 1998)*("Asociacion Colombiana")*.

In *Asociacion Colombiana* the Court concluded *inter alia* that Commerce lawfully used a peso-based interest rate to calculate the imputed credit expenses on U.S. dollar-denominated sales, that Commerce's decision with regard to inflation adjustments was in accordance with law, and that Commerce appropriately applied best information available ("BIA") to Flores del Rio.[1] slip op. 98–33, at 8–22, 34–44.

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[1] Familiarity with the Court's earlier decision in this case is presumed.

Plaintiffs now argue that (1) the Court should revisit Commerce's treatment of imputed credit expenses in light of a policy memorandum subsequently issued by the Department; (2) the Court should reconsider its decision regarding inflation adjustments as the Court confused the monetary correction claimed by Plaintiffs with the increase in value stemming from inflation adjustments to fixed assets; and (3) the Court erroneously concluded that Commerce was justified in applying BIA to Flores del Rio for not providing any explanation to support its corrections to reported depreciation expenses. Pls.' Mem. Supp. Mot. Recons. at 2 ("Pls.' Mot.").

DISCUSSION

The decision to grant or deny a motion for rehearing lies within the sound discretion of the court. *St. Paul Fire & Marine Ins. Co. v. United States*, 16 CIT 984, 984, 807 F. Supp. 792, 793 (1992), *aff'd*, 16 F.3d 420 (Fed. Cir. 1993); *Sharp Elecs. Corp. v. United States*, 14 CIT 1, 2, 729 F. Supp. 1354, 1355 (1990). The purpose of a rehearing is not to relitigate the case but, rather, to rectify a fundamental or significant flaw in the original proceeding. *Arthur J. Humphrey's, Inc. v. United States*, 15 CIT 427, 427, 771 F. Supp. 1239, 1241 (1991), *aff'd* and *adopted*, 973 F.2d 1554 (Fed. Cir. 1992). In ruling on a motion for rehearing, a court's previous decision will not be disturbed unless it is "manifestly erroneous." *St. Paul*, 16 CIT at 984, 807 F. Supp. at 793. A rehearing is a method of rectifying a significant flaw in the conduct of the original proceeding. *Id.* at 985 (citing *W.J. Byrnes & Co. v. United States*, 68 Cust. Ct. 358, C.R.D. 72–5 (1972)).

1. IMPUTED CREDIT EXPENSES

Plaintiffs argue that Commerce has repudiated the approach used in this case to adjust foreign currency borrowing rates to calculate imputed credit for U.S. dollar-based sales.[2] The basis for this claim is a policy bulletin issued by Commerce on February 23, 1998, addressing the appropriate interest rate to be used to impute credit expenses in cases where a respondent has no short-term borrowings in the currency of the transaction being examined.[3] Mem. From Carlo G. Cavagna re: Imputed Credit Expenses and Interest Rates (Feb. 23, 1998)("Imputed Credit Memo"). Plaintiffs maintain that this policy bulletin expressly repudiates Commerce's decision in the instant case to use adjusted peso borrowing rates. Pls.' Mot. at 3–4.

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[2] Plaintiffs also argue that the Court should review its assertion that Asocolflores presented "no evidence on the record demonstrating that U.S. dollar-denominated loans were actually available or that Colombian companies could be expected to use such loans." *Asociacion Colombiana*, slip op. 98–33, at 20. The Court issued an errata covering this matter on June 29, 1998.

Nevertheless, Plaintiffs misinterpret the Court's conclusion. The Court did not question the existence of dollar loans through a program of the Colombian export bank, BANCOLDEX. Nor did the Court overlook the fact that Asocolflores provided examples of respondents that had short-term dollar borrowings. In fact, for these respondents, Commerce imputed the U.S. credit expense using the interest rates associated with these dollar-denominated loans. *Id.* at 17. The Court simply found that in contrast to *LMI-La Metalli Industriale, S. p. A. v. United States*, 912 F.2d 455, 460 (Fed. Cir. 1990), where "LMI provided evidence that it had obtained dollar-denominated loans," Plaintiffs here did not provide evidence that all of the respondents had actually obtained dollar-denominated loans.

[3] The Court provided the parties in this case with an initial draft confidential opinion on February 26, 1998. The Court's opinion, *Asociacion Colombiana*, 22 CIT ___, slip op. 98–33, (both public and confidential version), was published on March 25, 1998.

However, this policy bulletin was not in effect at the time of the issuance of the final results.[4] In fact, the bulletin clearly states that Commerce's new practice will apply in "all future cases." Imputed Credit Memo at 5. More importantly, this Court found that the methodology employed by Commerce was in accordance with law.[5] *Asociacion Colombiana*, slip op. 98–33, at 16–22. The fact that Commerce later changed its policy does not detract from the Court's decision.

2. INFLATION ADJUSTMENTS

Plaintiffs argue that the "Court's decision confused the monetary correction adjustment claimed by plaintiffs with the increase in value stemming from inflation adjustments to fixed assets." Pls.' Mot. at 2. Plaintiffs assert that by the Court's description of the net monetary correction as the "newly stated asset values less increased equity," *Asociacion Colombiana*, slip op. 98–33, at 11–12 n.9 (citing Asocolflores' Mem. Supp. Mot. J. Agency R. at 13), the Court "misunderstood the net monetary correction, and what it represents * * *." Pls.' Mot. at 6.

However, as Asocolflores stated:

> Applying Colombian inflation accounting, two cost adjustments are made. First, asset values and depreciation are adjusted for inflation. The 1 million peso widget maker now is worth 1,250,000 pesos, and the annual depreciation expense increases to 1,250,000 x 20%, or 250,000 pesos. Second, a monetary correction is made. Calculated on the basis of nonmonetary assets, in this case, the widget maker (1 million pesos x 25%), less equity (200,000 pesos x 25%), this gain of 200,000 pesos (250,000–50,000) is, in effect, an adjustment to the exposed monetary liability (the 800,000 peso outstanding loan x 25%). This monetary correction gain results from the fact that the loan will be repaid in "cheaper" pesos.[6]

Asocolflores' Mem. Supp. Mot. J. Agency R. at 13. Thus, under the adjustment proposed by Asocolflores, Commerce would determine the "newly stated assets" (1 million pesos x 25%) and then deduct "increased equity" (200,000 x 25%). Accordingly, the Court did not err in its summary of Asocolflores' requested adjustment.

Plaintiffs also argue that the Court's initial decision "nowhere provided any reason why the net monetary correction was not allowed as an offset to costs." Pls.' Mot. at 6. Plaintiffs are mistaken.

At the administrative level Asocolflores raised the inflation adjustment issue arguing that Commerce should have reduced production costs by the amount of the "difference between required inflation adjustments to asset values and accumulated depreciation." *Asociacion*

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[4] It is well-established that "Commerce has the flexibility to change its position * * *." *Cultivos Miramonte S.A. v. United States*, 21 CIT ___, ___, 980 F. Supp. 1268, 1274; *see also Hoogovens Staal BV v. United States*, 22 CIT ___, ___, slip op. 98–27, at 9 (Mar. 13, 1998)(noting that Commerce is not required to adhere to its prior reasoning as long as it explains why it has changed its position).

[5] However, the Court found "that Commerce failed to cite evidence to support the conclusion that its methodology—adjusting for the devaluation of the peso against the dollar—is well-founded." *Asociacion Colombiana*, slip op. 98–33, at 22. Thus, the Court remanded this issue to Commerce for reconsideration.

[6] Excerpted from an inflation adjustment example presented by Asocolflores assuming 25% annual inflation. *See* Asocolflores' Mem. Supp. Mot J. Agency R. at 12–13.

Colombiana, slip op. 98–33, at 11 n.9. In the underlying case, Asocolflores shifted its argument maintaining that Commerce should adjust production costs by the amount of the income from the net monetary correction. *Id.* Commerce argued that Asocolflores failed to exhaust its administrative remedies with regard to the newly proposed adjustment. The Court found that Plaintiffs had "sufficiently raised the issue presented, whether Commerce erred in making adjustments for inflation, notwithstanding that Asocolflores has shifted its argument as to what type of adjustment should be made." *Id.*

In *Asociacion Colombiana*, Asocolflores argued that in numerous other cases involving identical or equivalent inflation accounting, both this court and Commerce have expressly recognized that the monetary correction must be taken into account in calculating costs of production and constructed value. *Id.* at 14 n.11. The Court rejected Asocolflores' assertion noting cases where Commerce did not take the monetary correction into account in calculating costs of production. *Id.* at 14–16 (citing *Camargo Correa Metais S.A. v. United States*, 17 CIT 897, 899 (1993)(upholding Commerce's determination that the monetary correction under Brazilian GAAP is an aggregate inflation adjustment restating owner's equity and permanent assets and does not specifically relate to the product, nor to the period of review and thus, it would be distortive to apply the adjustment); *Aimcor, Ala. Silicon v. United States*, 20 CIT ___, ___, slip op. 96–79, at 3 (May 21, 1996)(upholding Commerce's rejection of the monetary correction under Brazilian GAAP), *aff'd on other grounds*, 141 F.3d 1098 (Fed. Cir. 1998)).[7]

Finally, Asocolflores also argues that Commerce's final results did not specifically address the monetary correction adjustment proposed by Asocolflores. Pls.' Mot. at 6–9. That the Department did not specifically discuss the monetary correction should come as no surprise to Plaintiffs as the Court found in *Asociacion Colombiana* that Asocolflores "shifted its argument as to what type of adjustment should be made," slip op. 98–33, at 14 n.11, after Commerce had published the final results. Nevertheless, Commerce's reasoning for rejecting Asocolflores' original adjustment also supports the rejection of the proposed net monetary correction adjustment.

In *Asociacion Colombiana*, the Court recognized Commerce's practice to deny adjustments to constructed value that are based on investment activities or company business unrelated to the production of the subject merchandise. *Id.* at 15. Asocolflores argues the mere fact that respondents are flower growers establishes a link between the monetary correction and flower production. Pls.' Mot. at 7. However, there is no record evidence to support the alleged link between accounting entries for income from the net monetary correction and flower production acti-

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[7] During the administrative proceeding, counsel for Asocolflores agreed that inflation accounting under Colombian GAAP is the same as Brazilian GAAP. *See* P.R. Doc. No. 1709, at 79 (Def.'s Mem. Opp'n Asocolflores' Mem. Supp. Mot. J. Agency R. Ex. 3).

vities. Thus, the Court properly rejected Asocolflores' proposed monetary correction.

3. Application of BIA

Plaintiffs argue that the Court's decision upholding Commerce's application of BIA based on Flores del Rio's failure to document corrections submitted with a questionnaire response reflects a fundamental misunderstanding of Commerce's practice.[8] Pls.' Mot. at 9.

Section 776(c) of the Tariff Act of 1930, as amended 19 U.S.C. § 1677e(c)(1988), states that Commerce "shall, whenever a party or any other person refuses or is unable to produce information requested in a timely manner and in the form required, or otherwise significantly impedes an investigation, use the best information otherwise available." Commerce's regulations implement this mandate by authorizing the use of BIA whenever the Department (1) Does not receive a complete, accurate and timely response to Commerce's request for factual information; or (2) Is unable to verify, within the time specified, the accuracy and completeness of the factual information submitted. 19 C.F.R. 353.37(a).

Commerce must "fairly request" the data prior to resorting to any secondary information. *See Koyo Seiko Co. v. United States*, 92 F.3d 1162, 1165 (Fed. Cir. 1996). Once Commerce has done so, it possesses the "discretion to determine whether a respondent has complied with an information request." *Daido Corp. v. United States*, 19 CIT 853, 861, 893 F. Supp. 43, 49–50 (1995).

In this case, Commerce made a fair request from Flores del Rio because "the supplemental questionnaire clearly requested inflation adjustments to previously reported depreciation expenses." *Asociacion Colombiana*, slip op. 98–33, at 36–37. The question is whether Flores del Rio properly responded to that request. In *Asociacion Colombiana*, the Court upheld Commerce's finding that Flores del Rio did not properly respond to Commerce's request for information, thereby, affirming Commerce's application of BIA to the company. *Id.* at 37–40.

As in the underlying case, Plaintiffs argue here that under *NTN Bearing Corp. v. United States*, 74 F.3d 1204 (Fed. Cir. 1995), Commerce was required to accept Flores del Rio's correction of clerical errors.[9] Pls.' Mot. at 12. *NTN Bearing* is inapposite.

In *NTN Bearing* in response to Commerce's preliminary determinations, NTN submitted a timely response to the Department's questionnaire. NTN also requested that Commerce correct two clerical errors made by the company in its earlier submission that NTN alleged caused a substantial increase in the dumping margins. *NTN Bearing*, 74 F.3d at 1205. "NTN submitted supporting documentation to establish the cleri-

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[8] Plaintiffs also argue that the Court based its ruling in *Asociacion Colombiana* upon a statute and regulation concerning verification that by their terms do not apply in this case. Pls.' Mot. at 9. The Court issued an errata covering this matter on June 29, 1998. The provisions at issue did not constitute the primary basis for the Court's decision. *See Asociacion Colombiana*, slip op. 98–33, at 36–40; *see also infra* text pp. 9–11.

[9] Plaintiffs also argue that the Court in *Asociacion Colombiana* erroneously cited to the statutory provision relating to Commerce's correcting its own clerical errors. The Court issued an errata covering this matter on June 29, 1998.

cal nature of these errors and sought to have these entries deleted before the final determination." *Id.* at 1208. The Federal Circuit held that Commerce's refusal to consider NTN's request for correction of clerical errors under the circumstances constituted an abuse of discretion. *Id.* at 1208–09.

In this case except for one sentence in Flores del Rio's response which merely stated that the company "was also correcting some errors" Flores del Rio provided neither an explanation nor any documentation to establish the clerical nature of the changes. *See Asociacion Colombiana*, slip op. 98–33, at 39.

Plaintiffs assert that "[t]he Court here appears to have created a whole new requirement that respondents during the questionnaire phase of an investigation or review must document any and all corrections, even though there is no requirement that they document originally submitted data." Pls.' Mot. at 13. Plaintiffs misinterpret the Court's decision. *See Asociacion Colombiana*, slip op. 98–33, at 38–39. The Court simply found that Flores del Rio had not established the "clerical" nature of the changes made and therefore did not fall under the purview of *NTN Bearing*.

CONCLUSION

In accordance with the foregoing opinion, Plaintiffs' motion for rehearing and reconsideration of judgment is denied.

(Slip Op. 98–105)

BOUSA, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 90–12–00658

[Plaintiff seeks partial summary judgment and severance regarding four of twelve entries of petroleum distillates imported from Romania. *Held:* Since the parties dispute whether the subject merchandise was properly tested, plaintiff's motion is denied as to three of the entries. The motion is granted as to one entry reliquidated by Customs at plaintiff's requested rate.]

(Dated July 21, 1998)

Herbert Peter Larsen, for plaintiff.

Frank W. Hunger, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice *(John J. Mahon);* of counsel: *Edward N. Maurer,* Office of Assistant Chief Counsel, International Trade Litigation, United States Customs Service, for defendant.

OPINION AND ORDER

MUSGRAVE, *Judge:* This action is before the Court on plaintiff's Motion for Partial Summary Judgment and Severance. The motion is:

(1) denied as to Entry Nos. 4602–86–103263–1, 1001–458–0000104–7, and 1001–458–0000565–9; and (2) granted as to Entry No. 4602–86–101202–0.

BACKGROUND

The subject matter of this dispute is twelve entries of petroleum distillates imported from Romania by plaintiff Bousa, Inc. ("Bousa"), formerly known as Bulk Oil (USA), Inc. The merchandise was liquidated by defendant the United States Customs Service ("Customs") as "Motor Fuel" under Item 475.25 of the Tariff Schedules of the United States ("TSUS") at the rate of 1.25 cents ($0.0125) per gallon. Bousa unsuccessfully protested Customs' classification arguing that the merchandise should have been classified as "[n]aphthas derived from petroleum, shale oil, natural gas, or combination thereof (except motor fuel)" under TSUS Item 475.35, or, alternatively, as "[m]ixtures of hydrocarbons not specifically provided for * * *" under TSUS Item 475.65, and reliquidated at a duty rate of .25 cents ($.0025) per gallon.

Bousa moves for summary judgment and severance as to four of the twelve entries, Nos. 4602–86–03263–1, 1001–458–0000104–7, 1001–458–0000565–9, and 4602–86–101202–0. Subsequent to filing this motion, Bousa abandoned its claim to Entry No. 4602–86–101202–0 after Customs reliquidated that merchandise under TSUS Item 475.65 at the desired rate of .25 cents ($.0025) per gallon.

STANDARD OF REVIEW

Summary judgment is appropriate if "there is no genuine issue as to any material fact * * * and the moving party is entitled to judgment as a matter of law." USCIT R. 56(d); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Where a genuine issue as to material facts exists, summary judgment must be denied. The Court has jurisdiction under 28 U.S.C. § 1581(a) (1994).

DISCUSSION

Bousa alleges that it is entitled to summary judgment based on Customs' failure to properly test the subject merchandise in accordance with the American Society for Testing and Materials Standard D–439 ("ASTM D–439"). Customs admits that it did not *report* results for each of the ASTM D–439 tests but argues that the tests were nonetheless *performed* by either Customs or a private laboratory under the employ of Bousa. Since it remains in dispute as to whether the ASTM D–439 tests were performed, the Court must deny Bousa's motion for summary judgment and severance as to Entry Nos. 4602–86–103263–1, 1001–458–0000104–7, and 1001–458–0000565–9. As to Entry No. 4602–86–101202–0, the Court finds that since Customs reliquidated this entry at the rate requested by Bousa, the motion for summary judgment and severance is granted.

CONCLUSION

Therefore, upon reading plaintiff's Motion for Severance and Partial Summary Judgment, defendant's response thereto, and upon due consideration of all other papers and proceedings had herein, it is hereby

ORDERED that plaintiff's Motion for Partial Summary Judgment and Severance as to Entry Nos. 4602–86–103263–1, 1001–458–0000104–7, and 1001–458–0000565–9 be, and hereby is, denied; and it is further

ORDERED that plaintiff's Motion for Summary Judgment and Severance as to Entry No. 4602–86–101202–0 be, and hereby is, granted; and it is further

ORDERED that Entry No. 4602–86–101202–0 is severed from this consolidated action, and is dismissed; and it is further

ORDERED that the parties shall confer, agree upon and submit a scheduling order in this case setting a trial date to determine the genuine issues of material facts that remain in dispute, and that such scheduling order shall be due within 30 days of the issuance of this Order.

(Slip Op. 98–106)

AK STEEL CORP., BETHLEHEM STEEL CORP., INLAND STEEL CO., INC., LTV STEEL CO., INC., AND U.S. STEEL GROUP A UNIT OF USX CORP., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND DOFASCO, INC., SOREVCO, INC., STELCO, INC., AND CONTINUOUS COLOUR COAT, LTD., DEFENDANT-INTERVENORS

Court No. 96–05–01312

[ITA remand results sustained.]

(Dated July 23, 1998)

Skadden, Arps, Slate, Meagher & Flom LLP, (Robert E. Lighthizer and *John J. Mangan)* for plaintiffs.

Frank W. Hunger, Assistant Attorney General, *David M. Cohen*, Director, *Velta A. Melnbrencis*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, *Robert J. Heilferty*, Attorney-Advisor, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

Willkie Farr & Gallagher (Daniel L. Porter, Christopher Dunn, and *Jacqueline A. Weisman)*, for defendant-intervenor Continuous Colour Coat, Ltd.

OPINION

RESTANI, *Judge:* Before the court are the United States Department of Commerce's ("Commerce") Redetermination Results Pursuant to Court Remand, *AK Steel Corp. v. United States*, Slip Op. 97–152, No. 96–05–01312, 1997 WL 728284 (Ct. Int'l Trade Nov. 14, 1997) [hereinaf-

ter *"Remand Results"*][1], on three issues: (1) ministerial errors in the calculation of Stelco's margin, (2) Dofasco's partial reversal of restructuring charges, and (3) Continuous Colour Coat, Ltd.'s ("CCC") post-sale price adjustments. Familiarity with the facts of this case are presumed.

I. DISCUSSION

A. *Ministerial Errors in Stelco's Margin Calculation*

The court granted Commerce's request for remand to correct certain ministerial errors in Stelco's margin calculation. *AK Steel*, Slip Op. 97–152, at 3, 1997 WL 728284, at *1. As the parties do not contest these changes the court sustains Commerce's changes to Stelco's margin calculation.

B. *Dofasco's Reversal Charges*

In *AK Steel*, plaintiffs challenged Commerce's inclusion of Dofasco's prior period reversals as credits to costs in its financial statements for 1993 and 1994. Slip Op. 97–152, at 5, 1997 WL 728284, at *2. In its remand instructions the court ordered Commerce to eliminate the credit for reversals, "unless it can articulate a rational reason for abandoning its past practice." *Id.* at 32, 1997 WL 728284, at *10–11.

As a result, in the *Remand Results* Commerce eliminated the credit for the partial reversal of prior period charges from Dofasco's costs calculation.[2] *Remand Results*, at 10. The parties do not contest this portion of the *Remand Results*. Thus, the court sustains this determination.

C. *CCC's Post-Invoicing Price Adjustments*

Before the court plaintiffs challenged Commerce's determination that CCC's post-invoicing price adjustment methodology for credit and debit notes allocated to multiple sales was acceptable. *AK Steel*, Slip Op. 97–152, at 58, 1997 WL 728284, at *19. The court found that neither Commerce nor the parties adequately supplied evidence as to whether CCC's price adjustments were sufficiently related and allocated to specific sales transactions. *Id.* at 58, 1997 WL 728284, at *19. The court instructed Commerce to:

> indicate where in the record the debits and credits noted are shown to be properly related either directly or through allocation to specific sales transactions. If Commerce determines an acceptable level of specificity has been achieved or may otherwise be overlooked because a few such adjustments were made to the "same customer" within a "limited period," Commerce shall indicate where this is factually supported in the record and why these facts are relevant.

Id. at 58–59, 1997 WL 728284, at *19 (citation omitted).

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[1] Pursuant to the new antidumping and countervailing duty regulations, all remand determinations dated after May 16, 1997 will be available on the International Trade Administration website. *See Antidumping Duties and Countervailing Duties*, 62 Fed. Reg. 27,296, 27,330 (ITA 1997) (rules and regulations). The remand results in this case are available at http://www.ita.doc.gov/import_admin/records/remands/97–152.htm.

[2] In its review of Dofasco's margin calculation, Commerce also made corrections for ministerial errors it identified in the calculations of interest expenses, general and administrative expenses, and variable and total cost of manufacturing for model match purposes. *Remand Results*, at 10. These adjustments are not in dispute; thus, the court sustains Commerce's findings regarding Dofasco's final margin.

Of the twenty home market and U.S. sales examined by Commerce during verification, only four home market and zero U.S. sales involved post-invoicing adjustments. *Remand Results*, at 2–3. Commerce addressed each of these sales in its remand analysis.

1. *First and Second Home Market Sales*

Commerce found an acceptable level of price specificity in CCC's price adjustment methodology for the first and second home market sales. *Id.* at 3–5. According to Commerce, CCC adequately related the first and second home market sales to specific sales transactions and work-orders over which the notes were applied. *Id.* The parties do not contest Commerce's findings. The court sustains Commerce's findings on this issue.

2. *Third Home Market Sale*

In the third home market sale, CCC's credit note referenced one work-order. *Remand Results*, at 5. The work-order contained multiple invoices and CCC allocated the credit note to all transactions made pursuant to the work-order on a weighted average basis. *Id.*; *See CCC Sales Verification Exhibit 40a*, at 1–2. In their comments on the draft remand determination, plaintiffs alleged that CCC misapplied the credit note. *Remand Results*, at 5. They cited an internal complaint form which referenced the work-order about which the customer complained, and also referenced a coil number. *Id.* Of the invoices involved only two referenced the coil in question. *CCC Sales Verification Exhibit 40*, at 6–12. Petitioners argued that for the credit adjustment to be transaction-specific, only merchandise produced from this coil should be subject to the adjustment.

In the *Remand Results*, however, Commerce found the evidence on the record did not support plaintiffs' belief. *Remand Results*, at 5. The returned merchandise consisted of two skids, each assigned an individual number. *Id.* Information on the record indicates that the skids did not originate from the coil identified on the internal complaint form. *Id.* Rather, Commerce found that it was impossible to match the two returned skids to any specific coil. *Id.* Because of CCC's inability to match the returned merchandise to the coil identified on the internal complaint form, Commerce found that CCC's allocation of the credit note across sales made pursuant to the work-order identified on the form was sufficiently specific. *Id.* at 5–6.

Plaintiffs claim this information shows CCC did not use the most specific methodology possible. According to plaintiffs, the internal complaint form is the best evidence to use when allocating the note because it identifies a specific coil number. They aver that for the credit adjustment to be transaction specific, only transactions involving the coil number referenced in the internal complaint form should be subject to the adjustment. Therefore, they allege that CCC incorrectly applied the credit note to the invoices that were not specifically tied to the coil number.

Moreover, plaintiffs find fault with Commerce's reliance on the skid numbers because, according to plaintiffs, it is irrelevant that the skid

numbers from the returned merchandise do not match any of the skid numbers noted on the invoices made pursuant to the work-order in question. This lack of correspondence, according to plaintiffs, does not indicate that the returned material did not originate from the referenced coil. Plaintiffs arrive at this conclusion by indicating that generally it is unlikely that the same skid is used to deliver and return the same material. According to plaintiffs, nothing in the record suggest that these were the same skids used by CCC to ship the merchandise; therefore, it is faulty reasoning to try to use the skids to link the merchandise with a specific coil number.

In the alternative, plaintiffs argue that even if the skid numbers could identify the merchandise, Commerce still erred because the two skid numbers do not correspond with any of the skid numbers that appear on the relevant invoices. This shows, according to plaintiffs, the merchandise identified by the skids could not have come from those invoices; therefore, no credit should have been allowed.

Finally, plaintiffs argue that the flaw in CCC's allocation methodology causes it to report all sales involved incorrectly. In particular, plaintiffs claim that the methodology used by CCC has an averaging effect on prices, i.e., the transactions that did not involve the coil received price reductions when there was in fact no reduction in price, and the transaction that did involve the coil did not receive the full amount of the credit. According to plaintiffs, this distortion is not mitigated by the fact that the sales were all to the same customer and occurred over a limited period of time. Plaintiffs note that Commerce suggested in the *Certain Corrosion-Resistant Carbon Steel Flat Products and Certain Cut-to-Length Carbon Steel Plate from Canada*, 61 Fed. Reg. 13,815, 13,822 (Dep't Commerce 1996) (final results), that these factors eliminated the possibility of an averaging effect on prices, but that Commerce did not explain the relevance of these factors in the *Remand Results*. This, according to plaintiffs, bolsters their claim that the presence of such factors does not eliminate price distortion.

As a preliminary matter, the court notes the general rule that Commerce requires post-sale price adjustments to be accompanied by transaction-specific information. *See SKF USA Inc. v. United States*, Slip Op. 95–85, at 16–17, 1995 WL 283855, at *7–8 (Ct. Int'l Trade May 8, 1995). The court finds plaintiffs' arguments unpersuasive and agrees with Commerce that CCC's price adjustment methodology is acceptable under the circumstances for the third home market sale. As the data were inconclusive as to which invoices the note applies, CCC's allocation across all invoices provides an acceptable level of transaction specificity in this instance. Although CCC cannot directly tie the credit note to a single invoice, it can link the credit note to particular sales of in-scope merchandise made pursuant to a single work-order.

Based on the facts on the record, a more specific methodology was not possible. Contrary to plaintiffs' assertions, the record does not show definitively that the returned merchandise originated from only the refer-

enced coil number. As the internal complaint form did not explicitly identify the invoice numbers of the returned material, CCC was precluded from allocating the credit to only two of the invoices made pursuant to the work-order. Moreover, it is possible, as CCC suggests, that the other coil numbers were inadvertently omitted from the complaint form for a number of different reasons.

Furthermore, plaintiffs misinterpret Commerce's use of the information regarding the skid numbers on the returned merchandise. Commerce indicates simply that the skid numbers from the returned merchandise do not match those used for delivery. This makes it more difficult to trace the returned merchandise to a specific invoice number, but does not indicate, as plaintiffs claim, that no credit should be allowed at all. Consequently, the court sustains Commerce's finding that CCC adequately related its post-sale credit adjustment to specific sales transactions, using the most specific methodology possible.

3. *Fourth Home Market Sale*

A debit note issued to a customer in the home market that did not reference a specific invoice or work-order is the subject of the fourth home market sale. *Remand Results*, at 6; *See CCC Sales Verification Exhibit 43a*, at 1–2. Because the note did not identify a specific invoice or work-order, CCC allocated the note across all sales to that customer. *Remand Results*, at 6. Commerce notes that the allocation was only to the nine home market sales made to this one customer, which represents less than 0.5% of all home market sales. *Id.*

In the *Remand Results*, Commerce concluded that a more specific allocation was not feasible, and that CCC's methodology does not distort the normal value and in turn the dumping margin. *Id.* Commerce adds that:

> [e]ven if Commerce were to make an adverse inference and apply the full amount of the debit note to any of the nine home market sales made to this customer, the resulting effect on CCC's margin would be insignificant. For eight of the home market sales, there would be no distortive effect (and, in fact, for one of these sales, there is a slightly negative effect) on CCC's margin if the debit note was fully applied to any one of these sales. For the last home market sale, the full application of the debit note to that sale would result in a small increase in CCC's margin.

Remand Results, at 6. In Commerce's determination, it found no danger of an averaging effect on prices. *Id.* at 7.

Plaintiffs claim that relating the debit note on a customer-specific basis does not meet the transaction specific requirement. Also, they suggest that the record evidence contradicts Commerce's findings that there is no distortion. Plaintiffs indicate that when the full amount of the debit note is applied to one of the nine invoices, the margin increases. They claim that when the credit is applied to the eight other transactions similar distortions result, which cumulatively would have a significant affect on CCC's margin calculation.

The court does not find plaintiffs' argument persuasive. Commerce's calculations show that even if it made the adverse inference, the effect on CCC's margin would be insignificant. The plaintiffs rely on the slight increase for one sale to support their argument that the cumulative effect of other such distortions would be significant. Commerce's figures show, however, that no such cumulative effect will occur because the margin changes only when the debit note is applied to two of the seven sales. In fact, when applied to one of the two sales it results in a lowering of the dumping margin. *See CCC Analysis Memorandum for CIT Remand*, at 2. Hence, the worst case scenario that plaintiffs put forth is not convincing. The adjustment, although not invoice-specific, is sufficiently transaction-specific in light of the circumstances. Thus, the court upholds Commerce's acceptance of CCC's methodology for the fourth home market sale.

4. *Use of Best Information Available*

Lastly, plaintiffs contend that the use of best information available ("BIA") was warranted because the possibility of error is fifty percent. They arrive at this figure by indicating that in the four home market sales with post-invoice adjustments that Commerce analyzed, CCC twice used what plaintiffs believe was an unacceptable methodology. Plaintiffs suggest this shows the entire sample may be reported incorrectly. Thus, they ask that the case be remanded to Commerce with instructions to apply partial BIA to those sales for which CCC reported post-sale debits or credits. Plaintiffs ask the court to direct Commerce to disallow all credits for home market sales and all debits for U.S. sales, and to apply the highest credit as BIA to all U.S. sales with credit adjustments.

The error rate that plaintiffs put forth, however, is incorrect. Only four home market sales and no U.S. sales contained post-invoicing adjustments out of the twenty U.S. and home market sales that Commerce verified. Thus, plaintiffs miscalculated the possibility of error for the entire sample by focusing only on those four sales.

Additionally, Commerce may use BIA only if the necessary information is not available on the record, if a party is uncooperative in some way with Commerce's requests for information, or when the party's submissions fail verification. *See* 19 U.S.C. § 1677e (1994). These events did not occur in this case, thus the use of BIA is not warranted. Accordingly, the court rejects plaintiffs' request that this court direct Commerce to use BIA in its analysis.

For the reasons stated above the *Remand Results* are sustained in their entirety.

(Slip Op. 98–108)

USINAS SIDERURGICAS DE MINAS GERAIS, S.A., PLAINTIFF, AND COMPANHIA SIDERURGICA NACIONAL, INTERVENOR-PLAINTIFF *v.* UNITED STATES OF AMERICA AND U.S. DEPARTMENT OF COMMERCE, DEFENDANTS, AND NATIONAL STEEL CORP, AK STEEL CORP. (FORMERLY ARMCO STEEL CO., L.P.), BETHLEHEM STEEL CORP, GULF STATES STEEL, INC. OF ALABAMA, INLAND STEEL INDUSTRIES, INC., LTV STEEL CO., INC., SHARON STEEL CORP, U.S. STEEL GROUP A UNIT OF USX CORP, GENEVA STEEL, LACLEDE STEEL CO., LUKENS STEEL CO., AND WCI STEEL, INC., INTERVENOR-DEFENDANTS

Consolidated Court No. 93–09–00557–AD

[Motions by the plaintiff and the intervenor-defendants for judgment on the agency record denied; action dismissed.]

(Decided July 24, 1998)

Willkie Farr & Gallagher (William H. Barringer, Christopher A. Dunn, Daniel L. Porter, Vincent Bowen, Christopher S. Stokes and *Nancy A. Fischer)* for the plaintiff.

Dickstein Shapiro Morin & Oshinsky LLP (Arthur J. Lafave III, Douglas N. Jacobson and *Jeffery B. Denning)* for the intervenor-plaintiff.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen*, Director, and *Velta A. Melnbrencis*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; and Office of the Chief Counsel for International Trade, U.S. Department of Commerce *(Linda S. Chang)*, of counsel, for the defendants.

Skadden, Arps, Slate, Meagher & Flom (Robert E. Lighthizer, John J. Mangan and *Mark C. Del Bianco)* and *Dewey Ballantine (Alan Wm. Wolff* and *Michael H. Stein)* for the intervenor-defendants.

OPINION AND ORDER

AQUILINO, *Judge:* At issue in this action, which consolidates a whole series of filed complaints, are the *Final Determinations of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products, Certain Cold-Rolled Carbon Steel Flat Products, Certain Corrosion-Resistant Carbon Steel Flat Products, and Certain Cut-to-Length Carbon Steel Plate From Brazil* of the International Trade Administration, U.S. Department of Commerce ("ITA"), published at 58 Fed.Reg. 37,091 (July 9, 1993). The titular plaintiff, which is referred to from time to time hereinafter by its chosen acronym USIMINAS, contests the determinations via a motion pursuant to CIT Rule 56.2 for judgment upon the agency's record.[1] The motion articulates multitudinous reasons for relief which can be summarized as follows: (i) the ITA conducted its investigation(s) with "undue bias and hostility", to quote from the amended complaint; (ii) the agency's rejection of USIMINAS responses and resort to best information otherwise available was unwarranted; (iii) the ITA opted for punitive dumping margins even though USIMINAS was a cooperative foreign respondent; and (iv) bevelled plate should not have been held within the scope of the agency's investigation of cut-to-length steel plate.

[1] Subsequent to the filing of this motion, counsel for the encaptioned intervenor-plaintiff interposed a motion for voluntary dismissal pursuant to CIT Rule 41(a)(2), which motion can be, and it therefore hereby is, granted.

On their part, the encaptioned intervenor-defendants have also interposed a Rule 56.2 motion to the effect that the final margins are too low, based upon erroneous ITA "simple" averaging of their petition rates.

The court's jurisdiction is pursuant to 28 U.S.C. §§ 1581(c), 2631(c), and its standard for review of the contested agency determination(s)[2] is whether they are unsupported by substantial evidence on the record or otherwise not in accordance with law. 19 U.S.C. §1516a(b)(1)(B); 28 U.S.C. §2640(b).

I

The petitions filed with the ITA implicated manufacturers of steel flat products around the world, including USIMINAS and Companhia Siderúrgica Paulista ("COSIPA") and Companhia Siderúrgica Nacional ("CSN") in Brazil. The ensuing agency investigation(s) entailed questionnaires to those firms and the others regarding their home markets and circumstances of production and pricing. In the case of Brazil, the ITA was concerned from the outset about hyperinflation, which has been defined as "extreme inflation, usually over 100 percent per year, and * * * characterized by a devaluation of the currency." *North Star Steel Ohio v. United States*, 17 CIT 459, 467 n. 7, 824 F.Supp. 1074, 1081 n. 7 (1993), citing Samuelson & Nordhaus, Economics 81, 975 (13th ed. 1989). Indeed, the finding in the determination(s) at bar is that Brazil's rate of inflation "was never less than 20 percent a month" and "in each of the past five years * * * has never been lower than 475 percent". 58 Fed.Reg. at 37,093. In such a situation, the ITA attempts to decipher foreign-market value on a monthly or even shorter basis, as opposed to the whole period of investigation.[3] The same shorter-period approach is sought to be taken for cost of production and for constructed value. *See* Plaintiff's Appendix, Exhibit 6 (Section D).

When the respondents' initial submissions did not lend themselves to this tack, the ITA notified COSIPA (and the plaintiff) that they

> may not adequately compensate for inflation and that the period used to define "contemporaneous" sales should be shortened to two weeks or even one week, wherever possible.

Id., Exhibit 4, p. 1. The agency also stated that, if

> COSIPA decides to provide[] diffmers on a biweekly or weekly basis, * * * [it would] calculate biweekly or weekly weighted-average FMV's. In order to adhere to the principle of contemporaneity, the

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[2] The court notes that in *Certain Flat-Rolled Carbon Steel Products From Argentina, Australia, Austria, Belgium, Brazil, Canada, Finland, France, Germany, Italy, Japan, Korea, Mexico, the Netherlands, New Zealand, Poland, Romania, Spain, Sweden, and the United Kingdom*, USITC Pub. 2664 (Aug. 1993), the International Trade Commission ("ITC") determined that an industry in the United States was materially injured by reason of imports of plate from Brazil, ergo the antidumping-duty order published at 58 Fed.Reg. 44,164 (Aug. 19, 1993), but also that there was no such injury, or threat thereof, by reason of hot-rolled, cold-rolled or certain corrosion-resistant products from that country. To the extent there has been judicial review of those final negative determinations, they have been affirmed. *See United States Steel Group v. United States*, 18 CIT 1190, 873 F.Supp. 673 (1994), *aff'd*, 96 F.3d 1352 (Fed.Cir. 1996); *Kern-Liebers USA, Inc. v. United States*, 19 CIT 87 (1995); *Nippon Steel Corp. v. United States*, 19 CIT 450 and 827 (1995).

[3] *See, e.g., Camargo Correa Metais, S.A. v. United States*, 17 CIT 897 (1993). The subsequent history of that case in court is reported at 18 CIT 330 (1994), *vacated and remanded*, 52 F.3d 1040 (Fed.Cir. 1995), *on remand*, 21 CIT ___, Slip Op. 97–159 (Nov. 25, 1997).

> Department will not use diffmers if the sale date and shipment date of both the U.S. sale and the home-market sale(s) being compared occurred in different monthly, biweekly, or weekly periods. Diffmers and COP's should therefore be calculated on the same time-period basis * * * and should not straddle two different time periods.[4]

USIMINAS disagreed with this approach[5], but to little avail. For similar merchandise, all price-to-price comparisons were required by the ITA to be based on sales within the same month, with diffmers to reflect the difference between variable replacement costs on the date(s) of sale; and when no home-market sales of similar merchandise were available for comparison, or if neither product was manufactured during the month of sale, constructed value, based on a replacement cost of production, was required to be used. *See id.*, Exhibit 5, pp. 1–2.

When the agency reported its preliminary determination of sales at less than fair value[6], it relied on USIMINAS submissions to calculate cost of production and constructed value ("CV") but invited the company to supplement the data. Several ministerial errors were detected and corrected, which led to amendment of the preliminary determination. *See* 58 Fed.Reg. 28,393 (May 13, 1993). Upon attempted verification, however, the ITA came to conclude that the USIMINAS submissions had "serious, irreparable flaws"[7], whereupon it decided to resort to the best information otherwise available ("BIA") in lieu of the company's data. The final determination lists a weighted-average margin of 42.08 percent for USIMINAS, 109.00 for COSIPA, and 75.54 percent for all others then producing cut-to-length carbon-steel plate in Brazil. *See* 58 Fed.Reg. at 37,099.

A

As indicated above, in bringing suit for judicial review and filing its instant motion for relief, the plaintiff claims that the ITA "repeatedly changed its mind, without notice, about the information it required and the manner in which it had to be presented * * * [and] refused or was unable to comprehend the complexities that a hyperinflationary economy, such as Brazil's, added to an antidumping investigation." Plaintiff's Memorandum, p. 21. The following questions are posed, among others:

> (a) Whether the final adverse determination was the result of undue bias and hostility toward USIMINAS by Commerce Department officials, and part of a general pattern of unfair and unwarranted adverse determinations against foreign producers of flat-rolled steel.

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[4] Plaintiff's Appendix, Exhibit 4, p. 2. The acronyms "FMV" and "COP" refer to foreign-market value and cost of production, respectively. The term "diffmer" refers to allowances for the differences in merchandise which are calculated when similar, rather than identical, goods are used in determining foreign-market value and when it is established to the agency's satisfaction that pricing for the U.S. and the home market is due to such differences. *Cf.* 19 U.S.C. §1677b(a)(4) (1992). The ITA will normally consider costs of production in making those allowances. *See, e.g.*, 19 C.F.R. §353.57(b) (1992).

[5] *See* Plaintiff's Appendix, Exhibit 3.

[6] *See* 58 Fed.Reg. 7,080 (Feb. 4, 1993).

[7] 58 Fed.Reg. at 37,092.

> (b) Whether the Commerce Department's conduct of both the price-to-price and cost investigations made it impossible for USIMINAS to receive a fair and impartial decision on the merits.

Amended Complaint, para. 6. The motion at bar also avers that the agency

> staff gave inconsistent and ambiguous instructions to USIMINAS and its counsel (in many cases departing from precedent and prior practice), declined to clarify those instructions in a timely manner, refused to accept USIMINAS' own clarifying information (while accepting similar clarifications from respondents from other countries being investigated), and ultimately rejected all of the information USIMINAS submitted.

Plaintiff's Memorandum, pp. 21–22.

The defendants respond that any difficulties were not caused by the instructions but by the company's inadequate comprehension. They also point out that difficulties with the ITA instructions could not have caused the fundamental flaws discovered in the USIMINAS database during attempted agency verification.

(i)

According to the plaintiff, the ITA was required to provide special instructions to account for Brazil's hyperinflation. It argues that the agency's failure to give adequate guidance is most evident in the methodology used to pinpoint the home-market sales for price comparisons and in the requirements for cost-of-production analysis. The plaintiff claims to have requested instructions at the beginning of the investigation(s), only to be informed they were unavailable but "would be prepared shortly". *Id.* at 24. Once available, the instructions were

> without opportunity to comment, without any reference to prior practice or explanation of the basis for the change in prior practice, and with unrealistic deadlines for submission of the requested information.

Id. at 4. Moreover, the above-quoted agency diffmer methodology forecloses respondents in hyperinflationary economies from selecting similar home-market products for comparison with products sold in the United States unless the sale and shipment dates are within the same month in both markets. *See id.* at 26. Because of a two-to-three-month USIMINAS production cycle, the plaintiff asserts that the ITA "virtually guaranteed that [the company] would not be able to utilize price-to-price comparisons for any U.S. sales that did not have an identical product match in the same month as the U.S. sale." *Id.*

The defendants respond that same-month comparisons of sales did not constitute a change in practice, that earlier investigations[8] entailed similar matching methodology, and that company counsel seemingly understood the superiority of contemporaneous comparisons. *See* De-

[8] *E.g., Final Determination of Sales at Less Than Fair Value: Industrial Nitrocellulose from Brazil*, 55 Fed.Reg. 23,120, 23,122 (June 6, 1990).

fendants' Memorandum, p. 131. The defendants deny plaintiff's assertion of unfairness. With respect to the claim that the agency further confused matters by modifying the product-matching method, the defendants argue that, in response to USIMINAS objections, there was a "liberalization" of its practice to permit a greater number of matches.

Of course, the ITA has discretion to alter methodology—within certain limitations. *See, e.g., Koyo Seiko Co. v. United States*, 20 F.3d 1160, 1162–63 (Fed.Cir. 1994). And those precedents cited by the plaintiff[9] do not hold otherwise. Here, the agency informed USIMINAS of its approach, requested pertinent information, and gave the respondent(s) opportunities to comment. The record reflects interaction between the ITA and them, the nature of which this court cannot call "unfair". *See, e.g.*, Defendants' Appendix, Exhibit 10 (USIMINAS offered opportunity to clarify information prior to the final determination); Exhibit 21 (the company requested clarification of agency correspondence); Exhibits 35 and 36 (USIMINAS offered (and accepted) the opportunity to comment on the amended preliminary determination); Exhibits 3, 4, 7, 16, 25, 29, 30(granting the company extensions of time to respond).

(ii)

The plaintiff contends that the ITA "repeatedly failed to define its 'replacement cost' methodology in a manner which provided adequate notice to respondents of how to develop adjustments for similar merchandise and adequate response" to the COP and CV questionnaires. Plaintiff's Memorandum, p. 31. It also claims that the only guidance USIMINAS received merely directed it to use replacement costs in the calculation of cost of production and constructed value and to provide them on a monthly basis. *See id.* at 32. *Cf.* Plaintiff's Appendix, Exhibit 6, p. 1. Even with a precise definition, the plaintiff argues that any attempt to calculate replacement costs was unduly burdensome, "requiring literally tens of thousands of calculations not normally required." Plaintiff's Memorandum, p. 30.

The defendants counter that the ITA "provided adequate instructions, abundant opportunities for comments on its policies, substantial feedback, reasonable deadlines, and a steady stream of deadline extensions and other accommodations to USIMINAS." Defendants' Memorandum, p. 19. They point out that, in previous investigations, the agency required replacement costs if the adjusted actual costs were inaccurate, citing *Camargo Correa Metais, S.A. v. United States*, 17 CIT at 899–900 ("for all costs to be recovered in the normal course of trade, home market prices must be sufficient to recover the cost of replacing the materials used to manufacture the product"). Regarding the in-

[9] In *Creswell Trading Co. v. United States*, 15 F.3d 1054 (Fed.Cir. 1994), an ITA ruling was held "inherently unfair" since the agency first indicated that certain information was unnecessary and then later declared "the missing information so relevant that it could not render a determination in its absence". In *Sigma Corp. v. United States*, 17 CIT 1288, 841 F.Supp. 1255 (1993), the agency changed its position without giving notice to a respondent by issuing a final determination which was "the complete opposite" of its earlier position. In *Mitsui & Co. v. United States*, 18 CIT 185 (1994), the ITA's use of best information otherwise available was held unfair since the agency had neither provided clear instructions on the method of compiling information nor given the respondent an opportunity to revise its original submission.

structions to USIMINAS, it is argued that the agency did "not prescribe a single, fill-in-the-blanks approach to calculating cost of production[] and cost of manufacture". Defendants' Memorandum, p. 134. Furthermore,

> it would not have been appropriate for the Department to elaborate and defend a single replacement cost methodology * * *, not only because cost reporting must be appropriate to the facts of individual cases, but also because fundamental flaws and omissions in USIMINAS' databases prevented the Department from ever utilizing the cost data USIMINAS had reported.

Id. at 140–41.

Be that as it may, the plaintiff indicates that USIMINAS could have computed replacement costs, although to have done so would have been labor intensive.[10] And the record reflects that the company was free to consult with the agency regarding methodology. *See* Plaintiff's Appendix, Exhibit 6, p. 3. In addition, there is no showing that the errors in the USIMINAS data were created by the ITA's instructions. Similarly, the claim that the company was prejudiced by unclear instructions and strict deadlines has little merit. The record indicates that the company had chances to comment; that any comments were considered, and some resulted in revisions; that the company was granted extensions of time to comply; and that it failed to raise at the administrative level all of its instant arguments.

As for the claim that "the limitation on submitting additional clarifying information imposed on Brazilian respondents was more restrictive than that imposed on respondents from other countries"[11], the agency has discretion in accepting or not accepting data. That the agency's approach for the respondents in Brazil may have differed from its approach for other respondents in other circumstances is not in itself a violation of law.

(iii)

At the time of the ITA's steel investigations worldwide, the Department of Commerce, Office of the Inspector General audited the agency's performance and promulgated a report entitled "Import Administration's Investigations of Steel Industry Petitions." Upon commencement of this action, the plaintiff interposed a motion to supplement the agency record with that report. The motion was denied by the Chief Judge.

The plaintiff renews the motion now, alleging, among other things, that the report contains "many admissions". Plaintiff's Memorandum, p. 43. Even if true, this would not be ground for adding to the administrative record matter not before the decisionmaker at the time of its de-

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[10] The plaintiff asserts that replacement costs encompass inventory value, which "is the raw material acquisition cost in the month for which cost is provided." Plaintiff's Memorandum, p. 30. Calculation of such costs "involves extracting from the normal cost accounting system information on yields, rolling time, hourly costs, recirculation rates for costs from indirect cost centers, etc. and applying these to the 'replacement' value extracted from the normal system." *Id.*

[11] Plaintiff's Memorandum, p. 41 n. 45.

termination. On the other hand, the plaintiff has made the report a part of the judicial record. And the court is unable to find that it supports plaintiff's specific concerns. Ergo, the motion for reconsideration should be, and it hereby is, denied.[12]

II

To justify its resort to best information otherwise available, the ITA reports "serious, irreparable flaws in the respondent's submission" *viz.* date of sale; cost of production, constructed value and diffmer; product concordance; and quantity and value of sales. *See* 58 Fed.Reg. at 37,092–93. Whereupon the agency stated that,

> [b]ecause USIMINAS cooperated with the Department's investigations, * * * [it] used as BIA for that respondent the average dumping margin alleged in the petitions for each product.

Id. at 37,094. Nonetheless, the plaintiff takes the position that its data were more accurate than the "arbitrary rate" selected for USIMINAS. Plaintiff's Memorandum, p. 44.

A

The agency's final determination states that the company reported

> incorrect dates of sale in 38 percent of the U.S. sales that the Department reviewed at verification. In 23 percent of the reviewed sales (60 percent of the sales with erroneous dates), the correct sale date was outside the originally reported month of sale; in certain cases, the correct date of sale was outside the [period of investigation] entirely. * * * Without knowing whether the correct universe of sales and month of sale have been reported, the Department is unable to carry out two essential components of its LTFV calculations. First, the Department is unable to determine to which home-market sale(s) any given U.S. sale should be compared. * * * Second, the Department is unable to calculate adjustments for differences in the physical characteristics of the merchandise. * * *

58 Fed.Reg. at 37,093. Moreover:

> * * * At such high monthly rates of inflation, it is crucial that LTFV comparisons be made, and diffmers calculated, on a monthly basis rather than over the entire [period of investigation] because erroneous cross-month comparisons—even if the date of sale is off by a single month—would distort LTFV margins by over 20 percent, which is unacceptable.[13]

The plaintiff contends that it correctly used the "specification and size assortment advice", also referred to as the "final specification" document during verification, for calculating date of sale "since it was the

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[12] In addition, defendants' motion to strike all references to the report contained in plaintiff's reply memorandum should be, and it hereby is, denied.

[13] 58 Fed.Reg. at 37,093. Date of sale was defined by the agency as

> the purchase order date, the contract date, or, where written confirmation is given, the order confirmation date (*i.e.*, the point in the transaction where the basic terms of the contract, particularly price and quantity, are agreed to by the parties involved) * * *.

Defendants' Appendix, Exhibit 1, App. II, p. 1.

first document establishing the price and quantity to be purchased."[14] In this action, the plaintiff claims that (i) its methodology was not flawed, (ii) that the errors discovered were not "serious", and (iii), whatever those errors, they had no significance for the agency's analysis. Plaintiff's Memorandum, pp. 47–48.

(i)

The plaintiff contends that the ITA failed to show "a single flaw" in the date-of-sale methodology and that the company's approach "was the only correct [one] that could possibly have been used". *Id.* at 48. With a voluminous database, encompassing hundreds of thousands of transactions, it is argued that handpicking the best possible document for each transaction was impossible. *Id.* at 49. During such investigations, the plaintiff claims that the agency selects a single document for date-of-sale purposes, notwithstanding any subsequent changes in terms.

The court cannot concur with this last representation. It can agree that USIMINAS's decision to use the specification- and-size-assortment advice provided a convenient starting point for responding to the ITA's questionnaire, but not necessarily the final or only one. *Cf., e.g., Final Determinations of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products, Certain Cold-Rolled Carbon Steel Flat Products, and Certain Cut-to-Length Carbon Steel Plate From Belgium*, 58 Fed. Reg. 37,083, 37,090 (July 9, 1993)(date of sale to be reported as "the date that price and quantity are first set"). Here, upon comparison of earlier with later sales documents, the court observes that some transactions do exhibit differences in both pricing and quantity amounts. *See* Plaintiff's Appendix, Exhibit 15, pp. 39–44. *Budd Co. v. United States*, 14 CIT 595, 604, 746 F.Supp. 1093, 1100 (1990), established that it is

> appropriate for Commerce to choose to effectuate the primary statutory purpose in favor of fair determinations based on contemporaneous comparisons. * * * [W]ere Commerce to do otherwise, dumping margins would result from the application of exchange rates, a circumstance which was wholly beyond the control of the exporters, an unacceptable outcome.

Citations omitted. *See also General Housewares Corp. v. United States*, 16 CIT 24, 783 F.Supp. 1408 (1992). In short, plaintiff's proposed exclusive reliance on the specification-and-size-assortment advice for determining date of sale is misplaced.

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[14] Plaintiff's Memorandum, p. 51 (emphasis in original). USIMINAS indicated that its sales process begins with purchases through unrelated foreign trading companies. Thereafter, a

> trading company's order is finalized in the form of a purchase order. The purchase order is acknowledged and agreed to by USIMINAS with a sales confirmation. * * *
>
> Approximately two weeks after the sales confirmation is issued, the customer defines the precise specifications of the material ordered and confirmed by the sales confirmation. The document is referred to as the "specification and size assortment advice."

Plaintiff's Appendix, Exhibit 13, p. 10.

(ii)

At verification, the ITA found that some 38 percent of USIMINAS's reported dates of sale were incorrect.[15] Since several of the sales folders covered more than one transaction, the plaintiff posits that the agency "very likely examined all of the transactions included on the examined invoices", thereby leading to, at most, a ten percent rate of error.[16] The plaintiff also points out that four of those transactions accurately specified the dates of sale, despite agency claims to the contrary. *See* Plaintiff's Memorandum, pp. 57–60.

No one denies that errors in reporting dates of sale can and did occur. The court should not simply consider the percentage of such error, it must also examine the record relied upon by the agency in concluding that that error was of moment. Here, examination reveals a number of USIMINAS sales in disparate months, or even outside the period of investigation altogether. *See* 58 Fed.Reg. at 37,093; Plaintiff's Appendix, Exhibit 16. And no satisfactory explanation is offered for those variations in price or quantity on the final specification documents and sales listings, leaving this court unable to conclude that the agency's finding with regard to dates of sale is unsupported by substantial evidence.

(iii)

The plaintiff disputes the ITA's position that it could not verify (a) whether USIMINAS had reported the correct universe of sales for the period of investigation[17] and (b) whether the company had correctly matched U.S. sales with home-market sales in the same month. *See* 58 Fed.Reg. at 37,093.

(a)

The plaintiff argues that, since the agency "found no discrepancies or errors" upon testing for completeness, then it, in fact, verified the entire universe of sales as accurate. That is, the ITA "was able to tie [the] universe of reported U.S. sales to its financial statements *to the ton*." Plaintiff's Memorandum, p. 62 (emphasis in original). On the other hand, the total number of reported sales should have varied significantly from the amount shown on USIMINAS's books had its sales information been seriously flawed. *See* Plaintiff's Reply Memorandum, p. 62.

The defendants counter that the plaintiff takes the significance of the completeness test out of context. As the verification report and the ITA's submission make clear, the agency's purpose is not to show that the cor-

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[15] The agency examined 39 U.S. sales and found mistakes in 15 transactions. It does appear that two of the 15 with incorrect dates of sale, however, were not transactions initially targeted.

[16] *See* Plaintiff's Reply Memorandum, p. 54. For verification, the ITA randomly selected 40 "target" transactions. Since each folder examined encompassed other transactions along with the target, the plaintiff claims that the agency actually considered 145 rather than 40, two of which involved the same invoice.

The ITA denies having done so. And the defendants have served a motion for leave to file their Clarification of Certain Statements Contained in Defendants' Memorandum in Opposition to Plaintiffs' Motion for Judgment upon the Agency Record which is hereby granted. Disregarding additional errors discovered in connection with nontarget transactions, the defendants continue to maintain that 13 of the 40 transactions selected revealed mistakes in the date of sale, resulting in the error rate of approximately one-third. *See* Defendants' Memorandum, p. 29.

[17] The agency relies on a "completeness test", which determines "whether all sales which should have been reported were reported and properly classified, and that only sales which should have been reported were included in the sales listings." Defendants' Memorandum, p. 33 n. 16.

rect shipments were investigated, rather that the details of particular shipments match what has been reported to the ITA. *See* Defendants' Memorandum, p. 33. Moreover, according to the agency, the completeness-test data are not cross-referenced against the final-specification or other documents. Instead, verifiers merely cross-check data against a sales listing at the moment of shipment.

The record shows that the agency verification did uncover errors in reporting "the universe of U.S. sales", including a grade of alloy plate and other cut-to-length plate from the USIMINAS sales listing. *See* Plaintiff's Appendix, Exhibit 15, p. 37. The reference to "no discrepancies or errors" is only to one aspect of a multipart test.[18] Moreover, while the sales universe may match USIMINAS's financial records, it is clear that the ITA only cross-checked shipment data against a listing of sales.

(b)

The plaintiff maintains that, as long as a contemporaneous exchange rate is used in converting home-market prices to dollars, a change in the date of U.S. sale does not cause margin distortion, given the agency's method for determining foreign-market value. This seemingly assumes that the cruzeiro/dollar exchange rate parallels inflation so that the conversion to U.S. dollars will neutralize the effects of inflation on the agency's margin determination. *See* Plaintiff's Memorandum, p. 66. The plaintiff also contends that distortions due to hyperinflation would only occur if the ITA converted foreign-market value for one period with an exchange rate from another. *See id.* at 64.

The defendants respond that home-market prices do not necessarily follow fluctuations in the rate of exchange. Those prices may increase at a greater rate than the number of cruzeiros needed to purchase dollars, thereby resulting in foreign-market value denominated in dollars increasing faster than United States price. *See* Defendants' Memorandum, p. 35. They also observe that, although FMV and USP may reflect those hyperinflationary effects, they must still be matched to the right month for the dumping margin to be properly calculated. *See id.* at 36.

Clearly, fluctuations in the rate of inflation, if unaccounted for, can engender margins that are distorted. *Cf., e.g., Budd Co. v. United States*, 14 CIT at 602, 746 F.Supp. at 1099 ("dumping margins should not be based wholly on the misapplication of exchange rates"). Here, the record indicates that home-market prices were not in lockstep with inflation or the exchange rate and, in fact, varied. *Cf.* Domestic Steel Producers' Opposition Memorandum, Appendix, Tab 6, Exhibit 6. And no one denies that date of sale is critical in a hyperinflationary case. *See, e.g.*, transcript of oral argument ("Tr."), pp. 39, 51–52.

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[18] The ITA found "no discrepancies" after examining five randomly-selected sales from each of the product listings. As part of this "reverse check" process, certain random dates are selected, and then shipments made on that date are checked against the relevant sales listings. *See* Plaintiff's Appendix, Exhibit 15, p. 37. In another portion of the agency's general discussion, however, it points to "various errors in the universe of U.S. sales subject to this investigation." *Id.*

B

The plaintiff takes the position that the record lacks substantial evidence in support of the premise that its cost information was deficient. The agency's final determination refers to coal cost, labor cost, depreciation, general and administrative expenses, pension costs, cost of extras, and standard costs for new products. *See* 58 Fed.Reg. at 37,096–98 (*Comments* 6–13).

(i)

That determination states that, in its questionnaire response,

> USIMINAS reported projected coal costs based on its anticipated expenses as of the date at which USIMINAS takes title to the merchandise. USIMINAS' anticipated expenses included ocean freight, port charges, taxes, and all related movement charges required to transport the coal to [its] mill * * *. Since USIMINAS takes possession of the coal at the time the ship leaves the foreign port, movement expenses * * * generally were estimated during the month before they were actually incurred. * * * USIMINAS' questionnaire response did substitute actual costs for the coal itself, but continued to use estimates for movement charges * * *. As a result, USIMINAS failed, at verification, to * * * accurately persuade the Department that its reported expenses accurately represent its current monthly costs for coal.

58 Fed.Reg. at 37,096. In response, the plaintiff now argues that

> (1) the error had a nominal effect on the accuracy of the costs presented (in the range of 0.2%–0.4%); (2) the error affected only certain elements of the coal costs; and (3) the Department had information to allow it to adjust the costs to take into account the effects of the error on the costs presented.

Plaintiff's Memorandum, pp. 69–70. It continues that the recording of these costs is "quite complicated"[19] because "movement expenses are first recorded based on projections and then adjusted to actual * * * costs when * * * known." *Id.* at 69. The plaintiff claims that it could tie its cost and constructed-value information directly to its financial statement when the replacement values of those costs are reversed and the historical values are substituted. *See* Plaintiff's Appendix, Exhibit 18, p. 61 (citing Exhibits 46B and 46C of the Cost Verification Report in support).

The defendants do not dispute the extent of the coal-cost discrepancy and even acknowledge some errors made by the agency. *See* Defendants' Memorandum, pp. 39, 41 n. 22. Instead, they claim that USIMINAS's reported costs could not be tied to its financial statements. *Id.* at 41. For one coal purchase, for example, only the forecast cost, along with an additional cost representing an exchange-rate variation, were entered into the general ledger. Other costs were not tied to the general ledger or satisfactorily explained. *See* Plaintiff's Appendix, Tab 9 (Exhibit 48). On

[19] Plaintiff's Reply Memorandum, p. 38.

the other hand, USIMINAS's reporting of coal costs creates but a minor distortion, representing perhaps 0.2 to 0.4 percent of the costs of production, hardly the threshold, standing alone, necessary to justify resort to best information otherwise available. *See, e.g., Asociacion Colombiana de Exportadores de Flores v. United States*, 13 CIT 13, 16, 704 F.Supp. 1114, 1117 (1989) ("Defects in data which are minimal do not result in failure of verification requiring use of best information available in place of all the respondent's data"), *aff'd*, 901 F.2d 1089 (Fed.Cir.), *cert. denied*, 498 U.S. 848 (1990).

(ii)

The plaintiff objects to the claim that USIMINAS understated labor costs by "not including accruals for holiday pay, bonuses, and 'thirteenth-month' salary[20], which are paid in other months." 58 Fed.Reg. at 37,096. According to the ITA,

> company officials admitted that they had not reported accruals as part of the fringe benefit costs reported in their labor cost response for the selected month * * *. These costs were included in the annual audited financial statement. Accordingly, the COP/CV data did not reflect all costs incurred.

Id. The plaintiff contends that any understatement of labor costs was caused by the agency's failure to fully comprehend USIMINAS's record-keeping. As indicated above, the ITA required the company to present its data using replacement costs, even though USIMINAS did not keep the information that way. Instead, the company utilized one of two record-keeping methods, either the "constant currency" system[21] or the "corporate legislation financial statement."[22]

Relying upon data from its constant-currency system, the plaintiff claims that (1) costs submitted on a replacement-cost basis will never tie directly to a financial statement based on historical costs, (2) the agency should distinguish between accruals related to bonuses, holiday pay, and thirteenth-month salary attributable to production in one month with different accruals occurring in other months of production caused by restatements in constant currency, and (3) the restatement of prior-month accruals is not appropriate in a replacement-cost system. Plaintiff's Memorandum, pp. 77–78.

The ITA argues that plaintiff's reliance on its constant-currency accounting is misplaced since "booked actual monthly costs already reflect the impact of inflation and, thus, can be reconciled to the historical financial statement." Defendants' Memorandum, pp. 45–46. The agency objects to USIMINAS's constant-currency adjustment for those accrued labor costs since they appear on the company's cost-of-manufacturing statement and should, therefore, already show the replacement costs.

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[20] This term refers to the accrual each month of a set amount, payable after twelve months.

[21] This entails restatement of costs monthly, and cumulatively at the end of the fiscal year, to provide a clearer picture of a company's operations. *See* Plaintiff's Memorandum, pp. 76–77.

[22] This approach reflects Brazilian generally-accepted accounting principles ("GAAP") by recording a temporary monetary correction as a capital reserve until the capitalization receives shareholders approval at their annual meeting. *See* Plaintiff's Appendix, Exhibit 9, p. 7 (Cost Verification Report).

This court concludes that the ITA's interpretation of the corporate legislation financial statement does not fully consider the complexity of USIMINAS's dual accounting and over-simplifies the data submitted. The agency fails to adequately explain how adjustments for prior months, which are charged as costs for those months, are taken into account. They do not clearly fall within the definition of replacement costs since some accrue in one month but then result in an expenditure in a subsequent month.[23] As has been suggested by the plaintiff, differences between the submitted costs and the amounts shown on USIMINAS's financial statements could also represent an accounting for inflationary effects. In any event, the court is unable to concur that the reported fringe-benefit accrual costs are deficient.

(iii)

The ITA concluded that USIMINAS altered its depreciation costs by using unrealistic figures in calculating the useful lives of assets. Specifically, it changed

> the depreciable lives of * * * asset[s] in the middle of these investigations[, which] substantially distorted the submitted COP/CV and diffmer data. Products manufactured early in the [period of investigation] reflect significantly different depreciation costs than those produced in the latter part of the investigation. Furthermore, the revised remaining lives are much longer than the life commonly utilized for such assets in the steel industry worldwide * * *. This inconsistency is even greater when considering the number of years the revalued assets have already been in use.

58 Fed.Reg. at 37,097.

The plaintiff contends that there is no evidence that these changes understated depreciation, nor were they challenged by USIMINAS's shareholders or auditors, or by Brazilian tax or securities authorities. Moreover, it claims that the changes did not commence until after the period of investigation. Thus, they had no effect on diffmer calculations or any "material effect on the results." Plaintiff's Memorandum, p. 99.

NTN Bearing Corp. v. United States, 17 CIT 713, 720, 826 F.Supp. 1435, 1441 (1993), citing *Ipsco, Inc. v. United States*, 12 CIT 1128, 1130 n. 3, 701 F.Supp. 236, 238 n. 3 (1988), upheld the use of a firm's expenses as recorded in its financial statements "as long as those statements are prepared in accordance with the home country's * * * ('GAAP') and do not significantly distort the firm's financial position or actual costs." *See Cinsa, S.A. de C.V. v. United States*, 21 CIT ___, ___, 966 F.Supp. 1230, 1234–35 (1997). On the other hand, the ITA may consider expenses not recorded on company books even when that enterprise is relying on the home-market's generally-accepted accounting principles.

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[23] With regard to the thirteenth-month payment, for example, the initial accrual in the first month would be insufficient to cover the company's liability for the 13th month salary in December. As a result, an additional accrual for the month one provision of 1 is required in order for the aggregate of the provision at the end of month 2 to be sufficient in terms of the value of the currency at the end of month two to be equivalent to two-twelfths of the 13th month payment * * *. It is *not* * * * a replacement cost of production in that month.
Plaintiff's Reply Memorandum, pp. 19–20 (emphasis in original).

See, e.g., NTN Bearing Corp. v. United States, 19 CIT 1221, 1235–36, 905 F.Supp. 1083, 1095–96 (1995).

Here, the changes to asset lives were substantial and had an impact on reported costs. As the record shows,

> USIMINAS revised the * * * lives of its plants [*sic*] assets. This change in accounting estimate was based on a four month study performed by USIMINAS's engineers.[] For each asset the expected useful [life] was extended thereby reducing the depreciation associated with these assets. This change reduced the submitted CV for those products shipped from July through October * * *.
>
> * * * In reviewing the submitted depreciation cost for June, the Department noted that the submitted amount * * * was less than the amount reflected in the monthly financial statement * * *. It may be appropriate to use the amount reported in the monthly financial statement as this was the amount reflected in the audited annual report.

Plaintiff's Appendix, Exhibit 9, pp. 21–22. The useful lives assigned by USIMINAS were indeed longer than those assigned by comparable companies within the steel industry. *See* Defendants' Appendix, Exhibit 49, Exhibit 50, App. 1. Even though the revised accounting for deprecation started after the period of investigation, to the extent subsequent, affected data were required for proper analysis[24], the agency could not ignore them.

(iv)

The plaintiff disputes the ITA's finding that USIMINAS's general and administrative ("G&A") expenses were deficient in that they did not include a "social contribution tax"[25] and certain non-operating expenses. As for the latter, the ITA, reports that they

> represent costs which are ordinarily incurred in a company's business. The Department includes these expenses in revenue in G&A except when such expenses/revenues are not specifically related to other business activities of the company. The cost verification exhibit relating to non-operating income and expenses shows that the great majority of these expenses relate to provisions for losses on loans to the electric company ELETROBRAS, not from sales of real estate. The Department verified that USIMINAS provided these loans to ELETROBRAS as part of its electricity payments. Since energy costs are related to the production of subject merchandise, these expenses should have been included in G&A.

58 Fed.Reg. at 37,097.

The plaintiff responds that those outlays should not have been included because they "related to investments in assets which were not

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[24] As the intervenor-defendants point out, since

> normal lead time between the date of sale and the date of shipment was two to four months for USIMINAS, constructed values for March through October were matched with U.S. sales made in January through June.

Domestic Steel Producers' Opposition Memorandum, p. 70 (footnote omitted).

[25] Apparently, this is assessed only when a company has generated income. *See* Plaintiff's Memorandum, p. 84. Since there is no reference to this tax now by the defendants or intervenor-defendants, the court concludes that it was not an element of the ITA's attempted computation of COP/CV and thus need not be considered herein. *Cf.* Tr. at 36.

'used in production' consistent with Department practice." Plaintiff's Memorandum, p. 85. There is no record evidence showing that the real estate investments result in non-operating losses or that the investments in ELETROBRÁS involved assets which were used in production. *Id.*

According to the defendants, "since no information has been provided on the nature of the real estate involved, there is no indication that these investments are not associated in some way with the operations of the company." Defendants' Memorandum, p. 52. They also note that the ELETROBRÁS "investments" or "loans" are billed on USIMINAS's monthly electric statements. *Cf.* Plaintiff's Appendix, Exhibit 9, p. 20. Thus, the ITA concluded that they were related to the provision of electricity and operation of USIMINAS and should therefore have been included in G&A expenses, which are defined on the record as

> those expenses which relate to the activities of the company as a whole rather than to the production process. These would include expenses which are not identified with a particular operation * * *.

Domestic Steel Producers' Appendix, Exhibit 14, p. 14.

There is insufficient evidence whether the real estate investments were associated with the operations of the company or not. Since the plaintiff does not present an answer, the court can only note that the losses, if proven, would represent a small percentage of the total nonoperating expenses. *See* Defendants' Appendix, Exhibit 51. *See also Magnesium Corp. of America v. United States*, 20 CIT ___, ___ n. 63, 938 F.Supp. 885, 897 n. 63 (1996)(complainants, not Commerce, bear the burden of persuasion in this kind of action).

With respect to ELETROBRÁS, the amounts apparently are listed separately from the charges for electricity, are recorded as assets, and earn interest[26], but they have not been repaid, and USIMINAS does not appear to expect any net return. *See* Defendants' Appendix, Exhibit 51, p. 1 (ELETROBRÁS loans referred to as probable losses). The payments are compulsory[27] and appear related to the procurement of electrical power.

(v)

The domestic petitioners claimed that USIMINAS understated its pension costs based on "an independent actuary's report [that] these costs may not be sufficient to cover USIMINAS' ultimate liability." 58 Fed.Reg. at 37,097. In its final determination, the agency agreed with the report[28], which

> the Department examined at verification [and which showed] that USIMINAS's pension-fund accruals fell short of the amounts re-

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[26] *See* Plaintiff's Appendix, Exhibit 7, p. 84.

[27] *See id.*, Exhibit 9, p. 20 (indicating that any companies owned or formerly owned by the state "pay for the development, maintenance and upgrade of Brazil's hydro-electric power").

[28] *See* Defendants' Appendix, Exhibit 52.

> quired to meet its pension obligations. USIMINAS should have recorded this shortfall in its labor costs for 1992.

Id.

The company indicated that it reported its pension expenses in accordance with its accounting methods and Brazilian GAAP. The plaintiff argues that, had it stated pension costs in accordance with the actuary's report, then it would have been exposed to allegations that its responses were deficient since its reported costs would not have matched those costs underlying its financial statement. In addition, the plaintiff points out that the shortfall between the fund's reserves and payment expenses was "cumulative" and represented "underfunding since the inception of the fund"; it was not just attributable to 1992. *See* Plaintiff's Reply Memorandum, pp. 32, 33. Retroactive adjustments noted by the ITA, according to the plaintiff, merely reflected subsequent events and did not provide a basis for resort to best information otherwise available.

In contrast, the agency is of the view that there simply was "a management decision * * * which lowered * * * booked costs for the year in question". Defendants' Memorandum, p. 54. Assuming retroactive adjustments were made, as indicated by USIMINAS's half-year financial statement[29], then the ITA contends that the company still bore the responsibility of reporting actual costs to the agency.

Indeed, the ITA is not limited to financial records kept pursuant to the home-country GAAP. It may accept those records, but it also may reject them if their acceptance would distort true costs. *NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1206 (Fed.Cir. 1995)(citations omitted). *See also Camargo Correa Metais, S.A. v. United States*, 17 CIT at 899 ("If the finding that Brazilian GAAP does not reasonably reflect the cost of production is supported by substantial evidence on record, then the ITA's rejection of those procedures must be affirmed"). Quite clearly, uncontradicted[30] actuarial results for the period of investigation indicate that USIMINAS's pension costs were understated.

(vi)

The plaintiff objects to the agency's finding that its "methodology for assigning costs to products did not differentiate between the cost of extras, as requested in the Department's questionnaire." 58 Fed.Reg. at 37,093. USIMINAS maintains costs for final products, not for individual extras, using a four-digit code system. The ITA verified that the company

> itemized extras separately on customer invoices and that each extra increased the gross price by a certain amount. Allocating the total cost of all extras over many products without regard to whether or not they underwent additional processing is inappropriate. USIMINAS should have itemized the cost of these extras in its cost submis-

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[29] *See* Plaintiff's Appendix, Exhibit 24, n. 15.

[30] *Id.*, Exhibit 7, p. 88.

> sions to enable the Department to calculate diffmers and make "apples-to-apples" comparisons. * * *
>
> Furthermore, the fact that USIMINAS is able to itemize the price of extras individually at the invoice level suggests that USIMINAS has the ability to allocate the cost of extras to those products incurring extras.

Id. at 37,097.

The company claimed it was "unable to report costs on a product-specific basis in any other way without reconstructing its cost accounting system from the ground up." *Id.* Instead, it argues that an average, not an itemization of the cost of extras, is required since it "calculates only the costs for a given combination of extras not individual extras". Plaintiff's Memorandum, p. 92. The failure to submit individual-extra costs was irrelevant since USIMINAS was able to identify each product compared, specify the extras, and provide the relevant costs. Finally, the plaintiff contends that the agency neither established that its methodology was "distortive in any respect nor that USIMINAS had the capability to provide the information in the format requested." *Id.* at 94.

The ITA requests that data be submitted in a specified format. Here, the agency directed the company to provide the cost of extras as follows:

> For each product sold in the U.S. and in the home market the costs of each extra(s) should be separately presented. The cost of the extra should include the materials, variable and fixed overhead and movement expenses.

Plaintiff's Appendix, Exhibit 6, p. 11. Although USIMINAS claims that it was impossible to itemize extras by their production costs, the company does not deny that extras are itemized separately on customer invoices. *See* Plaintiff's Memorandum, p. 93. While the agency may have been able to verify the cost of extras as proposed by the plaintiff[31], it may conduct an investigation notwithstanding resulting burdens on a party in attempting to be forthcoming.

(vii)

The domestic steel producers argued that USIMINAS's use of estimated, as opposed to actual, costs resulted in understatement of production costs for new products. The ITA found that

> USIMINAS' methodology in developing standard costs for new products, using normalized slab costs (which include [a weighted average of the] costs for both conventional and continuous slab processes) can cause an underallocation of costs to new products using only the conventional slab process[32]. USIMINAS' methodology for calculating standards for new products caused distortion in the allocation of costs. The standard costs for new products were there-

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31 *See, e.g.*, Defendants' Memorandum, p. 55.

32 The conventional method is apparently more expensive than the continuous process.

> fore significantly different from the actual cost incurred for those products.

58 Fed.Reg. at 37,097–98.

The plaintiff takes the position that the agency simply decided not to accept its accounting[33] but failed to show that that system was inaccurate, unreliable, or that the company could have derived the costs any other way. That is, there is

> no evidence that the number of transactions or new products affected was significant, that any of the transactions to the U.S. were affected, that any of the comparable merchandise sold in Brazil was affected, or that the manner in which USIMINAS' cost accouting system addresses new products affects the integrity of the overall system.

Plaintiff's Reply Memorandum, p. 36.

There is evidence, however, that the underreporting of costs for new products manufactured by conventional process created distortion.[34] Since slab costs for new products are based upon a weighted average, the agency indicates that the reported amount will not be as accurate as those standards used for older products. And, in any event, the ITA does not automatically accept a respondent's financial information. *Cf. Camargo Correa Metais, S.A. v. United States*, 17 CIT at 899. Several large deviations were detected, which, in this court's view, are attributable to USIMINAS's accounting method for new products. *See* Plaintiff's Appendix, Exhibit 9, p. 9.

C

The ITA found fault with USIMINAS's product concordance, citing several deficiencies and claiming that the company failed to conform to agency instructions. It found that

> USIMINAS included alloy steel products as well as carbon steel in its sales listings and product concordances. USIMINAS also compared products with high-strength characteristics to products with low-strength characteristics. The overall effect of these errors was that not only was the universe of reported products in itself incorrect, but products sold in the U.S. market were susceptible to being improperly matched to products sold in the home market. Information available on the record was insufficient to allow the Department to determine the proper product matches.

58 Fed.Reg. at 37,093.

The plaintiff explains that problems arose, in part, because the agency circulated a "concordance table", establishing those categories

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[33] USIMINAS uses an "INDCOR" or standard variation to measure variance in a single month or semester between a single product and the average of all products in a 4-digit product specification (which represent actual costs). The INDCOR is then used to adjust actual costs to arrive at a 27-digit product specification. *See* Plaintiff's Appendix, Exhibit 9, p. 8.

[34] *See, e.g.*, Defendants' Appendix, Exhibit 54. In most of the INDCOR transactions presented, the increase from semester to semester is relatively small. Accordingly, "INDCOR changes of less than 25% are unlikely to be due to changes in the use of conventional versus normalized slab costs." Plaintiff's Appendix, Exhibit 7, p. 91. A few transactions, however, do show differences well in excess of 25 percent.

the ITA assumed identical, and gave USIMINAS only 48 hours to submit written comments. *See* Plaintiff's Memorandum, p. 108. The table, however, did not reflect the company's product listings or own corporate records. *Id.* Given the short response period, USIMINAS claimed then that it was unable to "comment meaningfully" on the table and complains now that the agency adopted it "virtually without modification." *Id.*

(i)

The domestic steel producers contend that the company improperly matched alloy steels, which were outside the investigation's scope, with certain carbon steels in their product concordance. *See* 58 Fed.Reg. at 37,098 (*Comment* 14). The ITA states that, while it

> is able to identify and delete alloy products from U.S. sales, it is unable to do so on the home-market side because numerous grades of steel were sold in the home market, many of which were manufactured to proprietary specifications or foreign standards. Because insufficient information exists on the record with regard to these specifications and standards, the Department is unable to carry out the detailed analysis of the chemical composition of each product which would be required for us to separate alloy from carbon steel products. It is not the Department's responsibility to correct significant substantive errors in a respondent's submission; rather, it is the respondent's responsibility to provide the Department with a complete and accurate sales listing and product concordance. * * *

Id.

The plaintiff explains that this issue arose because "a separate identification field" was not created. Plaintiff's Memorandum, p. 115. Instead, USIMINAS's computerized system mixed together "a few products that had precisely the same grade, measurement and surface treatments for both alloy and carbon-steel products." *Id.* And the inclusion of alloy-grade in the sales listings and product concordances had only a limited effect, and resulted in misidentification in only a few specific instances.

When the ITA discovered such inclusion, it requested grade specifications for products sold in the home market. A review thereof confirmed that alloy products had been matched with carbon steel[35] in the concordance, thus distorting product matching. Although the plaintiff minimizes the severity of the distortion as involving a limited number of products, the defendants point out that each "grade" can encompass many "products", and each "product" can have many sales. Defendants' Memorandum, p. 80. *See also* Domestic Steel Producers' Opposition Memorandum, p. 51 ("even if only four *grades* were involved, the errors could still affect * * * possibly thousands of individual sales transactions") (underscoring in original).

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[35] *See* Plaintiff's Appendix, Exhibit 15, p. 18. *See also* Defendants' Appendix, Exhibits 60, 61, 62.

(ii)

The petitioners pointed out that USIMINAS misreported and mismatched certain steel as "high strength" in the product concordance. That term was defined in the hot-rolled and cold-rolled questionnaires as having a minimum yield strength of 35,000 pounds per square inch ("psi") to 50,000 or more. *See* Defendants' Appendix, Exhibit 1, App. V, pp. 5, 7. The ITA found that USIMINAS was unable to provide the study results in support of its submitted classification. The agency indicates that it analyzed other data, apart from merely measuring carbon content, to conclude that the steel was not high-strength. It reports the company's position that

> SAE norms do not specify a yield strength and that USIMINAS, therefore, d[id] not carry out yield-strength tests on a regular basis. In order, therefore, for USIMINAS to include a yield-strength variable in the product description, as required by the Department, USIMINAS used the best information available to it at the time. In response to the Department's statement that SAE-grade material "does not have enough carbon to meet [the] minimum yield strength" * * *, USIMINAS claims that the classification of such materials was correct, based on a study carried out by three major Brazilian integrated steel producers and on the classifcation of such products under the Harmonized Tariff Schedule (HTS) * * *. USIMINAS also asserts that, should the Department persist in its view that certain SAE-grade products are low-strength, the Department could easily re-code and re-match those products itself.

58 Fed.Reg. at 37,098 (*Comment* 15).

As indicated, the plaintiff claims that its classification was correct based on the Brazilian steel producers' study which found that SAE-grade steel had an average yield strength of 40,000 psi. *See* Plaintiff's Memorandum, p. 110. Although USIMINAS did not submit that report for review, handwritten notes were presented which conclude that most of the SAE-grade materials had a yield strength of less than 275 mp, which, according to the defendants, equates to a minimum yield point of less than 40,000 psi. *See* Defendants' Memorandum, pp. 70–72. Be that as it may, the court observes in passing that those handwritten notes are inconclusive of plaintiff's position. *Cf.* Plaintiff's Appendix, Exhibits 27, 28.

(iii)

The petitioners were of the view that USIMINAS incorrectly characterized some sales as hot-rolled sheet, when they should have been categorized as cut-to-length plate. The record is clear that, while the company defined any cut-to-length plate less than 5 mm in thickness as hot-rolled sheet, the agency considered that maximum to be 4.75 mm. *See* Plaintiff's Appendix, Exhibit 15, p. 37; Defendants' Appendix, Exhibit 1, App. V.

The plaintiff argues that this difference is irrelevant since none of its home-market sales of hot-rolled sheet thicker than 4.75 mm were used

by the ITA in a product comparison for the hot-rolled concordance table. *See* 58 Fed.Reg. at 37,099 (*Comment* 16). Only a small percentage of sales, 1.755 or a total of 552[36], were improperly classified, and none of the covered products were used in the comparison and therefore had any impact upon the hot-rolled-product concordance table. The plaintiff also takes the position that the agency could have reclassified those sales without resorting to best information otherwise available.

The ITA reports in its final determination that

> this error had a significant effect on FMV, CV, and diffmers. Because "thick sheets" should have been included in plate thickness band "A" (*i.e.*, less than 0.3125 in.), * * * the absence of these products in the plate database distorted weighted-average FMV calculations. This error also caused incorrect CV's to be calculated, since CV's are weight-averaged for each control number. Finally, this error caused incorrect diffmers to be calculated for plate falling within thickness band "A," since USIMINAS did not include its "thick sheets" in the appropriate control numbers within the plate concordance. A significant number of USIMINAS' U.S. plate sales fell within this thickness band and could have been matched to the missing "thick sheets"[.]

Id. And it now argues that "it was of paramount importance that all sales of steel products be reported in the context of the correct investigation." Defendants' Memorandum, p. 72.

It is uncontested that thinner plate requires more processing and is more expensive to produce than thicker ones. *See, e.g., id.* at 76; Plaintiff's Reply Memorandum, p. 79. Hence, the absence of thinner plate from the cut-to-length investigation was likely to skew the pricing data and lead to inaccurate determination of foreign-market value, constructed value and even margin of dumping. Despite the limited number of affected sales, the court is persuaded that the degree of error[37] is of moment, since the capture of all U.S. sales at their actual prices is always at the heart of an ITA investigation. *E.g., Florex v. United States*, 13 CIT 28, 33, 705 F.Supp. 582, 588 (1989). Accordingly, respondents must report the volume and value of sales as precisely and completely as possible.

D

Notwithstanding the foregoing concerns of the ITA, the plaintiff claims to have been the victim of a "gotcha policy"[38], whereby the agency

> withholds scrutiny until verification, disagrees with the respondent's position for the first time at verification, and then refrains from requesting the respondent to revise its information in accordance with the Department's position.

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[36] *See* Plaintiff's Memorandum, p. 120.

[37] Albeit only some 3.5 percent. *See* Plaintiff's Reply Memorandum, p. 76.

[38] Tr. at 8.

Plaintiff's Reply Memorandum, p. 70. *Cf. Böwe-Passat v. United States*, 17 CIT 335, 343 (1993) (agency held arbitrary and capricious when it "sent out a general questionnaire and a brief deficiency letter, then effectively retreated into its bureaucratic shell, poised to penalize Böwe for deficiencies * * * that the ITA would only disclose after it was too late").

Such was not and is not the case here. The ITA has discretion in determining when to turn to best information otherwise available. *See, e.g., Geneva Steel v. United States*, 20 CIT ___, ___, 914 F.Supp. 563, 590 (1996). While it may not do so on whim or inconsequential deficiency[39], when errors are "cumulative and widespread, Commerce may reject the submitted information *in toto*." *Yamaha Motor Co. v. United States*, 19 CIT 1349, 1360, 910 F.Supp. 679, 688 (1995), citing *Rhone Poulenc v. United States*, 13 CIT 218, 710 F.Supp. 341 (1989), *aff'd*, 899 F.2d 1185 (Fed.Cir. 1990). As discussed hereinabove, the record does reflect errors—in USIMINAS's date-of-sale methodology, in its calculation of cost of production and constructed value, in developing its product concordance, for example—which satisfy the long-standing judicial definition of substantial evidence[40] and which make the ITA's determination to resort to the best information otherwise available in accordance with law.

III

In this action, the agency relied on total BIA, which means that the dumping margin is derived from sources other than any data submitted by the respondent to which it applies. *See, e.g., Nat'l Steel Corp. v. United States*, 18 CIT 1126, 1131, 870 F.Supp. 1130, 1135 (1994). Here, the rates alleged in each petition, including those based upon home-market prices and constructed values for all implicated Brazilian manufacturers, were averaged, resulting in final margins for USIMINAS of 42.08 percent for cut-to-length plate, 35.76 percent for cold-rolled sheet and 40.44 percent for hot-rolled sheet. *See* 58 Fed.Reg. at 37,099; Plaintiff's Appendix, Exhibit 30, p. 2.

The plaintiff takes the position that, since its errors discovered by the agency

> were either reparable or insignificant, the Department's determination to use total BIA was inappropriate. Even assuming that the alleged errors could not be corrected, the Department could have easily used partial BIA for these areas.

Plaintiff's Reply Memorandum, p. 85. It argues that, while allegedly "cooperative", the rates are in reality punitive[41] since they are higher than any other rate on record for USIMINAS. The plaintiff also claims

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[39] *See, e.g., Asociacion Colombiana de Exportadores de Flores v. United States*, 13 CIT 13, 16, 704 F.Supp. 1114, 1117 (1989).

[40] *See, e.g., Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951); *Matsushita Electric Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed.Cir. 1984); *Timken Co. v. United States*, 12 CIT 955, 962, 699 F.Supp. 300, 306 (1988), *aff'd*, 894 F.2d 385 (Fed.Cir. 1990).

[41] Punitive rates are the result of rejection of low-margin information in favor of high-margin information that is demonstrably less probative of current conditions. *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1190 (Fed.Cir. 1990).

that the U.S. and home-market prices which the petitions attribute to it[42] are more accurate than the average of all petition allegations, which are predicated upon prices and values constructed by the domestic, U.S. industry for all Brazilian producers.

Those that constructed them, the intervenor-defendants herein, complain about the ITA's factoring of their petitions' home-market prices into the final margins. That is, the

> only facet of the Department's Final Determination at issue here is the inclusion of margins based on home market prices in the calculation of a BIA dumping margin for USIMINAS.

Domestic Steel Producers' Memorandum in Support of Judgment Under Rule 56.2, p. 15. They contend their

> petitions unequivocally demonstrated * * * that these home market prices were significantly below the corresponding costs of production and, hence, such prices could not be used as the basis of FMV.

Id. at 18. *See* 19 U.S.C. §1677b(b) (1992).

The ITA has latitude in determining what constitutes best information otherwise available. It may reject inadequate or suspect submissions *in toto*, and it is not required to rely on BIA only for missing answers. *See, e.g., Ad Hoc Comm. of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States*, 18 CIT 906, 914–15 and n. 21, 865 F.Supp. 857, 865 and n. 21 (1994). Moreover, the role of this court is "not to determine whether the information chosen by Commerce is the 'best' actually available, but whether the choice is supported by substantial evidence and is in accordance with law." *Novachem, Inc. v. United States*, 16 CIT 782, 786, 797 F.Supp. 1033, 1037 (1992). The agency's authority, however, is "subject to a rational relationship between data chosen and the matter to which they are to apply." *Manifattura Emmepi S.p.A. v. United States*, 16 CIT 619, 624, 799 F.Supp. 110, 115 (1992). *See also D & L Supply Co. v. United States*, 113 F.3d 1220 (Fed.Cir. 1997) ("irrational" to uphold a rate when its foundation has been invalidated). But this "does not preclude Commerce from using a different methodology if it determines in its discretion that the circumstances so warrant." *Hussey Copper v. United States*, 21 CIT ____, ____, 960 F.Supp. 315, 319 (1997). The ITA may use

> "all information that is accessible or may be obtained, whatever its source." * * * This encompasses "the information submitted in support of the petition." * * * Furthermore, best information available "is not necessarily accurate information, it is information which becomes usable because a respondent has failed to provide accurate information."

N.A.R., S.p.A. v. United States, 14 CIT 409, 416, 741 F.Supp. 936, 942 (1990) (citations omitted). Finally, in relying upon best information

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[42] *See* Plaintiff's Memorandum, p. 127. According to USIMINAS, had dumping margins been calculated on a price-to-price basis, they would have been 0.00% for cut-to-length plate, 0.31% for cold-rolled steel and 13.98% for hot-rolled products. *See* Plaintiff's Appendix, Exhibit 30, p. 2.

otherwise available, there is no requirement that the agency select a margin restricted to the firm to which the rate is assigned. *Cf. Industria de Fundicao Tupy v. United States*, 20 CIT ____, ____, 936 F.Supp. 1009, 1018 (1996).

On the record presented herein, it is not clear which, if any, of the petition margins are more probative than others. The plaintiff indicates that margins based on constructed value and pricing for all steel producers in Brazil favor manifestly less accurate over more accurate information. *See* Plaintiff's Memorandum, p. 127. But those "more accurate" data come from the petitions herein, not from USIMINAS itself. This court is also unpersuaded that margins derived from constructed value are invalid simply because they may be based on estimates rather than empirical evidence. Here, the record supports the ITA's determination that it could not and therefore would not rely on USIMINAS's own data. Hence, the intervenor-defendants' contention that the ITA "implicitly concluded"[43] that margins had to be based on constructed value because of USIMINAS home-market sales below cost is also off the mark since the agency did not make any finding to this effect and, in fact, rejected as deficient data submitted in regard thereto. In sum, the court finds that the ITA's simple average of petition rates is supported by the record and otherwise in accordance with law.

IV

The plaintiff claims that the agency improperly expanded the scope of its cut-to-length steel investigation to include "non-rectangular cross-section" or "bevelled plate"[44]. While acknowledging that the agency may clarify the scope of an investigation, the plaintiff contends that the ITA abused its authority, given the exact wording of the petition in question, which refers only to "[r]olled products of solid rectangular (other than square) cross section". Domestic Steel Producers' Appendix, Exhibit 2, p. 3 n. 3. *Cf.* Plaintiff's Appendix, Exhibit 33. Since the petition did not explicitly include plate with a non-rectangular cross-section, the plaintiff also argues that it thereby unambiguously excluded bevelled plate. Moreover, the ITA's belated addition of such plate adversely affected the preliminary determination of the ITC, which allegedly had not collected any relevant data on this type of product. *See* Plaintiff's Memorandum, pp. 152–60. Hence, the "expansion" was invalid since "later stages of antidumping proceedings must maintain the scope set forth in the earlier proceedings". *Id.* at 160.

The defendants claim two ambiguities in the petition, to wit, "nonrectangular *shapes* are specifically excluded * * * while nonrectangular

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[43] Domestic Steel Producers' Memorandum in Support of Motion for Judgment Under Rule 56.2, p. 18.

[44] The intervenor-defendants describe these characteristics as follows:

> [P]roducts of "non-rectangular cross-section" are rectangular carbon steel flat products whose edges have been cut or bevelled to meet customer specifications. Bevelled plate refers to a broad spectrum of rectangular plate products that are processed to meet specific customer requirements. * * * Petitioners refer to products of non-rectangular cross-section as "bevelled plate."

Domestic Steel Producers' Opposition Memorandum, pp. 127–28 n. 316.

cross-section products are not"[45], and there is an inconsistency between the tariff general notes, which only cover rectangular-cross-section products, and the explanatory notes, which classify nonrectangular and rectangular-cross-section products together. The defendants also point out that the ITC's preliminary determination

> reflected an ambiguity as to whether bevelled plate was included, comparable to the ambiguity contained [in] the petition, which was clarified by the Department. The ITC clarified this ambiguity in its final determination, which defined the products in terms of Commerce's product descriptions.

Defendants' Memorandum, p. 121.

Although it is clear that products of nonrectangular shape were explicitly excluded from the petition, the same is not true of nonrectangular cross-sections. The record shows that "from the outset [the petitioners] intended that such products be within the scope of these investigations and did not believe language in the initiation notices regarding cross-sectional shape to exclude them." Plaintiff's Appendix, Exhibit 33, p. 10. Furthermore, it is established that

> the ITA has a certain amount of discretion to expand the language of a petition to encompass the literal intent of the petition, not to the exclusion of other factors, but certainly, with the purpose in mind of preventing the intentional evasion or circumvention of the antidumping duty law.

Mitsubishi Elec. Corp. v. United States, 12 CIT 1025, 1046, 700 F.Supp. 538, 555 (1988), *aff'd*, 898 F.2d 1577 (Fed.Cir. 1990). *See also Wirth Limited v. United States*, 22 CIT ____, Slip Op. 98–40 (April 3, 1998), *appeal docketed*, No. 98–1391 (Fed.Cir. June 30, 1998).

According to the record, bevelled plate is created through a relatively minor processing step, involving the burning off of "material at specified inclines." Plaintiff's Appendix, Exhibit 35, p. 5. The agency credibly demonstrates that including such product within its proceeding was not "a major step" since "[p]roducts of nonrectangular cross-section may be within the same class or kind as the products currently in the scope." *Id.*, Exhibit 40, p. 9. In fact, the explanatory notes to HTSUS heading 7208[46] include bevelled plate within the definition for flat-rolled products. Finally, the record reflects that information for such plate may have been obtained prior to the ITC's preliminary determination. *See, e.g., id.*, Exhibit 44. And the ITC's Office of Investigations has confirmed that its

> questionnaire did not explicitly exclude all nonrectangular cross-section products and that there is no evidence demonstrating that the questionnaire responses did not include data on products of nonrectangular cross-section.

Id.

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[45] Defendants' Memorandum, p. 109 (emphasis in original).

[46] *See* 3 *Harmonized Commodity Description & Coding System* § XV, II–72.08 (1993).

Based on the foregoing, the court concludes that the ITA's determination to include bevelled plate within the ambit of its proceeding is supported by substantial evidence on the record and otherwise in accordance with law.

V

To the extent that matters raised by the parties have not been addressed herein by the court, suffice it to state that they do not warrant specific reference. In the light of the discussion in parts I through IV of this opinion, plaintiff's and intervenor-defendants' motions for judgment on the agency record should each be denied and this consolidated action dismissed. Judgment will enter accordingly.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C98/96 7/6/98 Musgrave, J. [see Abstract No. V98/12]	Hayim & Co.	94–10–00641	Not stated	5703.90.00 7.6% for Jubilee rugs in Entry No. BA3–0000980–6 and Revival rugs in Entry No. BA3–0000999–6	Nissho Iwai *v.* U.S., 16 CIT 86, aff'd 982 F2d 505 (1992)	Norfolk Jubilee and Revival rugs
C98/97 7/15/98 Carman, C.J.	Roma Furniture Co.	93–7–00409	727.45 7%	727.29 5.3% 727.35 2.5%	Agreed statement of facts	New York Wood frame furniture articles including sofas, love seats, chairs and tables
C98/98 7/20/98 Goldberg, J.	Winter-Wolff, Inc.	96–6–01588, 97–1–00147, 97–3–00492	7607.11.30 5.8%	7607.19.60 3%	Winter-Wolff, Inc. *v.* U.S., S.O. 98–15 (1998)	Charleston Laser-treated aluminum capacitor foil
C98/99 7/20/98 Goldberg, J.	Winter-Wolff, Inc.	96–6–01589, 97–1–00148, 97–3–00493	7607.11.30 5.8%	7607.19.60 3%	Winter-Wolff, Inc. *v.* U.S., S.O. 98–15 (1998)	Savannah, Atlanta Laser-treated aluminum capacitor

ABSTRACTED VALUATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	VALUATION	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
V98/12 7/6/98 Musgrave, J. [see Abstract No. C98/96]	Hayim & Co.	94–10–00641	Transaction value	At price paid or payable by exporter/shipper to the sub-supplier or master waver who produced the tufted rugs or hand-woven rugs for plaintiff	Nissho Iwai *v.* U.S., 16 CIT 86, aff'd 982 F.2d 505 (1992)	Norfolk Tufted cotton rugs or other hand-woven rugs

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